Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

NORMA CAREY,

Petitioner,

v.

KNOX COUNTY, TENNESSEE; TIM HUTCHINSON, as Sheriff of Knox County, Tennessee,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM LEWIS JENKINS, JR.
Counsel of Record
WILKERSON GAULDIN HAYES & JENKINS
112 W. COURT STREET
P.O. BOX 220
DYERSBURG, TN 38024
(731) 286-2401

CHARLES R. TERRY
DENISE TERRY STAPLETON
TERRY, TERRY & STAPLETON
918 W. FIRST NORTH ST.
P.O. BOX 724
MORRISTOWN, TN 37815
(423) 586-5800

Counsel for Petitioner

Becker Gallagher Legal Publishing, Inc.
800.890.5001

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QUESTIONS PRESENTED

1. Whether a county is liable under 42 U.S.C. § 1983 and *Monell v. Dep't of Social Services,* 436 U.S. 658 (1978) for constitutional violations caused by the county's failure to have a policy guiding its law enforcement officers in the recognition and management of mentally ill/emotionally disturbed detainees.

2. What expert proof does the causation standard enumerated in *City of Canton v. Harris*, 489 U.S. 378 (1989) require to defeat a county government's motion for summary judgment on a failure to train claim under 42 U.S.C. § 1983.

3. Whether the failure of a Circuit Court of Appeals to follow its own binding precedent violates Article III of the United States Constitution and the doctrine of *stare decisis*.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Norma Carey, an individual citizen of the United States, residing in the Eastern District of Tennessee. Plaintiff brought this suit individually and in her capacity as Adminstratrix of the Estate of Warren Brad Carey, deceased. Warren Brad Carey was, at the time of his death, an individual citizen of the United States residing in the Eastern District of Tennessee. Neither Norma Carey nor Warren Brad Carey have any corporate affiliations. Norma Carey was the Plaintiff in the District Court and the Appellant in the Sixth Circuit Court of Appeals.

Respondents

Respondent Knox County, Tennessee, is a duly established county corporation of the State of Tennessee. Knox County is a corporate governmental entity and is a political subdivision of the State of Tennessee. Respondent Tim Hutchinson is (and was at the time of the acts alleged in the complaint) the duly elected sheriff of Knox County, Tennessee.[1] Respondent Jason Helton was an officer of the Knox County Sheriff's Department. Petitioner is unaware of any corporate affiliations of Tim Hutchinson or Jason Helton. Knox County, Sheriff Tim Hutchinson, and Officer Jason Helton were Defendants in the District Court and Appellees in the Sixth Circuit Court of Appeals.

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[1]Sheriff Hutchinson's name was spelled both Hutchison and Hutchinson in the record. Petitioner has used the spelling attached to his deposition throughout this petition.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit opinion (App. B at 3a) is not reported in the Federal Reporter; the opinion is reported in the Federal Appendix at 70 Fed. Appx. 291 (6th Cir. 2003). The District Court opinion (App. D at 12a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on July 2, 2003. (App. B at 3a.) Norma Carey timely filed a petition for rehearing or for rehearing *en banc*, which the Sixth Circuit denied by order entered August 26, 2003. (App. A at 1a.) This petition is filed within ninety days of the entry of the order denying rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

B. Article III of the United States Constitution, which provides, in part:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

STATEMENT OF THE CASE

Norma Carey, individually and in her capacity as administratrix of the estate of Warren Brad Carey, brought this case in the United States District Court for the Eastern District of Tennessee. Norma Carey brought, among other claims, a claim for the wrongful death of her son, Warren Brad Carey, under 42 U.S.C. § 1983. The district court had jurisdiction under 28 U.S.C. § 1343(a)(3) and 28 U.S.C. § 1331.

Norma Carey asserted that Knox County, Tennessee, through its chief law enforcement officer Sheriff Timothy Hutchinson, caused the death of Warren Brad Carey by its failure provide policy guidance and/or train its officers to recognize and manage mentally ill/emotionally disturbed persons that came into contact with the officers. Ms. Carey asserted that the actions of the individual officers, as well as the actions or omissions of Sheriff Hutchinson and Knox County, violated 42 U.S.C. § 1983, as well as several state law provisions. The district court granted summary judgment to Sheriff Hutchinson and Knox County on the § 1983 claims, and it refused to exercise pendent jurisdiction over the state law claims against Knox County and its sheriff. After the dismissal of individual claims against Officer Jason Helton, a timely appeal to the Sixth Circuit Court of Appeals ensued.

The Sixth Circuit Court of Appeals refused to reverse the decision of the district court. The Sixth Circuit panel assigned to the case issued a *per curiam* opinion adopting the district court opinion and additionally asserting Ms. Carey had never offered any proof that any constitutional violation by Knox County had caused the death of Warren Brad Carey. Ms. Carey petitioned the Sixth Circuit Court of Appeals for a rehearing *en banc* or, alternatively, a panel rehearing, both of which requests were denied by order entered August 26, 2003.

REASONS FOR GRANTING THE PETITION

I. The basic problem presented by this case, the baseline for regulating interaction between law enforcement and mentally ill persons, represents an issue of national urgency.

The criminal justice and penal system of the United States of America and its constituent states house over two million prisoners.[2] Of the individuals in governmental custody, statistical surveys identify between ten and twenty percent of these individuals as suffering from some type of mental illness.[3] As one recent report concluded: "Persons with mental illness are disproportionately represented in correctional institutions."[4] Some localized studies have found that over six percent of local jail inmates are "actively psychotic," a figure that represents a rate of serious mental illness "four times that found in the outside population."[5]

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[2] Paige M. Harrison & Allen Beck, Ph.D., *Prisoners in 2002,* Bureau of Justice Statistics [NCJ 200248], July 2003, at 1, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf (last accessed November 21, 2003).

[3] Human Rights Watch, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness* (2003), at 16-17, nn. 11, 12, 13, available at http://www.hrw.org/reports/2003/usa1003/ (last accessed November 21, 2003); Paula M. Ditton, *Mental Health and Treatment of Inmates and Probationers,* Bureau of Justice Statistics [NCJ 174463], July 1999, at 1-3, available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ mhtip.pdf (last accessed November 21, 2003). *See generally* Damon Maryl & Martin G. Karopkin, *Arrested Adults Awaiting Arraignment: Mental Health, Substance Abuse, and Criminal Justice Characteristics and Needs*, 30 Fordham Urb. L.J. 663, 663-667 (2003) (collecting and summarizing statistical studies on the contact of mentally ill persons with the criminal justice system, from arrest to incarceration).

[4] Human Rights Watch, *supra* note 2, at 17.

[5] *Id.*

The mentally ill individuals within the corrections system passed through the law enforcement system on their journey to jail or prison. The remarkable statistics for correctional institutions suggests even greater exigence in the law enforcement area: more persons than enter the corrections system come into initial contact with law enforcement agencies. Moreover, some data indicates that between twenty-five and forty percent of Americans who suffer from mental illnesses will be inside the criminal justice system at some point during their lives.[6] A significant percentage of all contacts between law enforcement officers and the public involve a person suffering from a mental illness of some type.[7]

Despite the massive contact between law enforcement officers and persons suffering from a mental illness, as late as 1999 no more than three percent of law enforcement agencies in cities with populations exceeding one hundred thousand reported having any specialized capability or training to respond to mentally ill persons.[8] (As the Petitioner demonstrated in the district court in the present case, the Knox County Sheriff's Department falls squarely within this category.)

These statistics point to a grave national problem. Though this Court does not legislate or respond to social problems in

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[6]Human Rights Watch, *supra* note 2, at 16 n.6.

[7]Martha Williams Deane, *Emerging Partnerships between Mental Health and Law Enforcement*, 50 Psychiatric Serv. 99, 100 (1999). This study indicates that seven percent of all "police contacts" involve persons "believed to be mentally ill." *Id.*

[8]Deane, *supra* note 7, at 99-100.

the manner of the Congress or Executive Branch, the work of this Court impinges on social policy in important ways. In the present case, just such a connection exists: Plaintiff's deceased son suffered from bipolar disorder and, on January 3, 1999, entered the throes of a manic episode; at roughly the same time, Mr. Carey came into the custody of the Knox County, Tennessee Sheriff's Department as a result of being detained for reckless driving. Mr. Carey's very disjointed behavior gave the officers of the Knox County Sheriff's Department some puzzlement about his condition, and they repeatedly reacted to the symptoms of his mental illness with physical force. Finally, the beating administered to Mr. Carey by Knox County's officers sent his blood pressure to a level that precipitated a capillary eruption in an artery of his heart muscle, which then closed the lumen of the artery and deprived his heart muscle of oxygen, ending Mr. Carey's life.

Norma Carey asserted that the failure to train and provide policy guidance to its officers relative to interacting with mentally ill persons led directly to the death of Warren Brad Carey and that Knox County had been deliberately indifferent to the danger of infringing upon the rights of persons suffering from mental illness. The expert witness who testified on behalf of the Petitioner in the district court placed the blame for the death of Warren Brad Carey squarely on the failure of the Knox County Sheriff's Department to provide guidance and adequately train its law enforcement officers in the recognition of mental illness and appropriate responses to the actions of mentally ill persons.[9]

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[9]The expert witness referenced in the text was Phillip L. Davidson, J.D., Ph.D. Excerpts from the testimony of Mr. Davidson appear in Appendices E (32a-45a), F (46a-56a), and G (57a-60a) to this petition.

At least two major confrontations occurred by Knox County law enforcement personnel and Warren Brad Carey. In its own way, each of the confrontations exemplifies the utter lack of training or guidance received by the officers, but the final confrontation exemplifies the utter disregard for the bodily integrity and safety of persons suffering from mental illness more forcefully than all others. By the time of the final confrontation, Norma Carey had called to inform the Knox County Sheriff's Department that Warren Brad Carey suffered from bipolar disorder and needed medication. By the time of the final confrontation, Mr. Carey had been calm for a period of time and had been resting peacefully in a cell in Pod 6C. By the time of the final confrontation, the officers of the Knox County Sheriff's Department had decided not to take any chances with Warren Brad Carey.

In the final moments of Mr. Carey's life, the Knox County officers entered Mr. Carey's cell in Pod 6C, dragged him off the bunk where he lay resting, wrestled him onto the floor of his cell, and began dragging him to the medical pod of the Knox County Detention Facility. The officers, in effect, precipitated a needless confrontation, for Warren Brad Carey had, at the moment of entry of the officers into his cell, been relaxing on his bunk.

When Mr. Carey began to struggle, the officers sprayed him with Freeze+P spray, struck him repeatedly on the body and head; finally, the physical assault drove his blood pressure to such a level that capillaries in his coronary artery burst and deprived his heart muscle of life-sustaining oxygen.[10]

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[10]An important excerpt of the testimony of Dr. Charles W. Harlan as to the causal connection between the beating administered to Mr.

II. This case presents an opportunity to define whether a cause of action exists under 42 U.S.C. § 1983 when a municipal entity fails to promulgate a policy, which represents a question of substantial importance upon which no consensus exists in this Court's precedent or among the circuit courts of appeal.

In the district court, in her main brief in the Sixth Circuit, and in her rehearing petition, Norma Carey pointed out that she made a claim against Respondent Knox County, Tennessee, for its failure to make and disseminate a policy governing the interaction of its law enforcement officers with mentally ill persons, including the application of force upon mentally ill persons. Like a standard use of force policy, Norma Carey asserted that Knox County should have had a policy in place in January 1999 setting forth the procedure and direction for its law enforcement officers to interact with mentally ill persons. Neither the district court nor the Sixth Circuit expressly ruled on this claim, which had the practical effect of disallowing the claim.[11]

This Court has not expressly decided whether a cause of action exists for the failure of a local governmental entity to promulgate a policy in the face of a need for such a policy;

Carey and his ultimate death appears at Appendix H (61a-67a) to this Petition.

[11] In the district court, this argument appeared in Ms. Carey's Memorandum of Law in Support of Plaintiff's Response to Motion for Summary Judgment at pages 18-19. In her main brief in the Sixth Circuit, the argument appeared at pages 46-48. In the Petition for Rehearing and Suggestion for Rehearing *En Banc*, the argument appeared at pages 7-9.

the present case presents a compelling opportunity to settle the question.

Several circuit courts of appeal have approved a cause of action for failure to make a policy where one is needed. For instance, the Eleventh Circuit has explicitly held: "[L]iability may be imposed due to the existence of an improper policy or from the absence of a policy." *Rivas v. Freeman,* 940 F.2d 1491, 1495 (11th Cir. 1991). Likewise, the Seventh Circuit approved a § 1983 cause of action for failure to give guidance by way of a policy, under certain circumstances, saying that "in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable." *Jones v. City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986). *See also Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir. 1981).[12]

The decision of the Sixth Circuit in the present case conflicts directly with the precedent of the other circuits that have approved a cause of action for a municipal failure to make a policy. Although the Sixth Circuit did not provide substantial discussion of its decision in the present case, its decision nonetheless disallows a cause of action for failure to maintain such a policy. (*See* App. B at 7a-9a.) In this respect, the decision of the Sixth Circuit in the present case conflicts with the decision of the Fourth, Seventh, and Eleventh Circuits cited above.

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[12]The Sixth Circuit previously made a passing remark in an unreported decision regarding such a cause of action, which Norma Carey brought to the attention of the district court. Norma Carey did not rely upon that unreported decision in her brief in the Sixth Circuit. The case is *Suttles v. City of Chattanooga*, 859 F.2d 153 (Table of Unreported Decisions), 1988 WL 98604 (6th Cir. 1988).

In addition, although a dissenting opinion in this Court has noted, in passing, that a cause of action may exist for failure to make a policy or provide guidance, *see Board of Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 435 (1997) (Breyer, J., dissenting), the language of *City of Canton v. Harris*, 489 U.S. 378 (1989) does not specifically include claims for failure to make a policy. Certainly, a failure to train and a failure to make policy to provide guidance to law enforcement officers and municipal employees have much in common: each claim would arise from a municipality's failure to act following knowledge of the risk of violations of the constitutional rights of those within the local government's jurisdiction. *See City of Canton*, 489 U.S. at 388-389; *Bryan*, 520 U.S. at 408-409.

As the testimony of the Petitioner's expert witness demonstrates, policy guidance for law enforcement officers can often be as important as training. For instance, specific guidelines for recognizing and managing mentally ill detainees would prevent inappropriate reactions to the seemingly arbitrary and unexplainable conduct of such persons. (*See* App. E at 34a-35a, 41a-42a, 44a-45a.) The presence of such a policy guidance would help to remove the variance and danger of a personally chosen course of action and would help to guide the conduct of law enforcement officers toward legally acceptable responses to varying situations.

This case comes to this Court after summary adjudication under Fed. R. Civ. P. 56 and affirmation of that summary adjudication in the Sixth Circuit. Summary judgment proceedings require (1) that all reasonable inferences be drawn by the reviewing court in favor of Norma Carey (the non-moving party), *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), (2) that the evidence offered by Norma Carey be believed, *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 255 (1986), and (3) that any dispute over the evidence be resolved in favor of Norma Carey. *Bishop v. Wood*, 426 U.S. 341, 347 (1976), *overruled in part on other ground by Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985).

Repeatedly, Norma Carey identified and emphasized the unequivocal testimony of her expert law enforcement witness, Phillip L. Davidson, J.D., Ph.D.: Knox County's failure to promulgate a policy for its law enforcement officers setting out procedures for the identification and management of mentally ill persons occurred in the face of frequent contact between law enforcement officers and mentally ill persons, contact that gave rise to a high risk of the deprivation of constitutional rights if specific guidance did not exist regarding the management of mentally ill persons in the custody of the Knox County Sheriff's Department. (App. E at 32a-45a; App. F at 51a-52a; App. G at 58a-60a.) Norma Carey's proof created a genuine dispute as to whether the Knox County Sheriff's Department should had an explicit policy to guide its officers in recognizing and interacting appropriately with mentally ill persons and whether the failure of Knox County to promulgate such a policy constituted a cause of the beating and death of Warren Brad Carey. (*See* (App. E at 32a-45a; App. F at 51a-52a; App. G at 58a-60a.)

Since she created a genuine factual dispute, Norma Carey's § 1983 claim could only have been subject to summary adjudication where no cause of action legally existed for failure to make a policy. The Sixth Circuit's refusal to allow such a cause of action, indicates that it adopted the position that no cause of action existed. This reasoning conflicts with the express decisions of at least three other circuit courts of appeal.

Given the importance of policy guidance in the protection of the constitutional rights of mentally ill persons coming into contact with law enforcement officers, this Court should accept review of this case in order to confirm the existence of a cause of action under 42 U.S.C. § 1983 for a local government's failure to make a policy dealing with the interaction between law enforcement and mentally ill suspects and detainees.

III. The Sixth Circuit's decision violates its own precedent, as well as the decision of this Court in *City of Canton v. Harris*, as to the measure of proof necessary to withstand summary judgment on a failure to train claim under § 1983.

In addition to her claim against Knox County for its failure to make a policy regulating the interaction of its law enforcement officers with mentally ill persons, Norma Carey also asserted a cause of action under *City of Canton v. Harris*, 489 U.S. 378 (1989) for the failure of Knox County to adequately train its law enforcement officers in the recognition and management of mentally ill persons. The Sixth Circuit disposed of the failure to train claim in a manner that violates this Court's decision in *City of Canton* and that violates the Sixth Circuit's own precedent.

A. The decision of the Sixth Circuit in this case contravenes this Court's precedent in City of Canton v. Harris, *489 U.S. 378 (1989).*

In the present case, the Sixth Circuit imposed a standard of causation that violates the principles of this Court's

decision in *City of Canton v. Harris*. The Sixth Circuit stated:

> As to the third factor [in the regime of liability for failure to train], the district court did not directly address the issue of causation. ***But neither did the plaintiff.*** Although she asserts on appeal that inadequate training regarding mentally ill inmates caused Helton's use of excessive force against Carey, she has not spelled out in the district court or in her brief before this court her theory regarding a crucial question in the causation chain: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *City of Canton*, 489 U.S. at 391. This deficiency alone would establish a sufficient basis for the entry of summary judgment in favor of the defendants.

(App. B at 9a [emphasis added].)[13] Likewise, the district

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[13] The statement that Norma Carey had not "spelled out" her theory on causation was an error by the Sixth Circuit. Norma Carey's brief in the district court and in the Sixth Circuit contained several pages of argument directly related to the causal link between Knox County's policy and training failures and the death of Warren Brad Carey. By way of example, Norma Carey's memorandum in support of her response to Knox County's motion for summary judgment stated:

> Also, as *City of Canton* requires, the lack of training (or inadequacy of the training) was "closely related" to the injury suffered by Brad Carey on January 3, 1999. First, the failure of the corrections officers to recognize Mr. Carey's mental illness from the plethora of signs given them in the sally port and in IRC led directly to numerous skirmishes with Mr. Carey, led to his being left to smash his head against hard walls and windows for several minutes in the holding area, and led to his being transferred to a regular cell first, instead of immediately to the medical pod. (Helton Dep., pp. 63-66; Bravo Dep., pp. 17-19; Internal Affairs Memorandum, Hutchison Dep., Exh. 1, pp. 2, 4-6.) Second, the failure of corrections officers to recognize Mr. Carey's serious illness led to his being dragged off his bed in Pod 6-C 101 (on the version of facts most favorable to the Plaintiff), knee-struck and then kicked in the head on his transfer to the rubber room, and engaged in a monumental struggle with five to six officers for several minutes while being transferred. (Internal Affairs Memorandum, Hutchison Dep., Exh. 4, pp. 2, 3, 4-6, 8, 9; Bravo Dep., pp. 18-29; Helton Dep., pp. 79-99)
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> * * * *
>
> [T]he Plaintiff here has direct and positive expert proof that the utter failure of the corrections officers to recognize

court opinion, adopted by the Sixth Circuit, stated: "The unfortunate reality is that even additional or better training might not have prevented Defendant Helton's allegedly unconstitutional conduct." (App. D at 29a.)

This holding fails to follow the dictates of *City of Canton* and, in critical way, incorrectly states the law of causation in § 1983 "failure to train" claims. This Court's exact statement in *City of Canton* was:

> Moreover, *for liability to attach in this circumstance the identified deficiency in a city's training program must be closely related to the ultimate injury.* Thus, in the case at hand, respondent must still prove that

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Brad Carey's serious illness led to the battering and the denial of correct care of Mr. Carey that raised his blood pressure, causing him to die. (Davidson Dep., pp. 132-139.) This violated Brad Carey's rights under the 4th and 14th Amendments to be free from excessive force while being "seized" or in police custody and to have attendance to his serious medical condition.

The actions that occurred because of the failure to recognize Mr. Carey's mental illness or emotional disturbance led directly to the abrasions and contusions that raised Mr. Carey's blood pressure, which in turn caused the blockage of a major coronary artery and subsequently killed Mr. Carey. (Harlan Dep., pp. 31-39, 61-62, exh. 2, 3.) Under the high standard set in *City of Canton*, then, the Plaintiff here has presented a question that must be decided by a jury: will they believe Mr. Davidson?; will they credit his experience over that of the officers of the Knox County Sheriff's Department? – the outcome cannot be known at this time, but the method of arriving at the outcome must be to put the question to a factfinder.

> the deficiency in training actually caused the police officers' indifference to her medical needs. Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect? Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances.

City of Canton, 489 U.S. at 391 (footnote omitted; emphasis added).[14]

This Court, in *City of Canton*, did not mandate, as the *sine qua non* of a failure to train claim under § 1983, that a plaintiff demonstrate at the summary judgment stage of a proceeding that a different training program would have prevented the injury. The Court recognized and attempted to balance competing concerns: (1) the rights of those injured by the unlawful actions of municipal employees, against (2) the Court's historical insistence that causation analysis under §

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[14] The Sixth Circuit had previously recognized, in an opinion binding upon the panel in the present case, that the *City of Canton* causation formulation should be read in the disjunctive, i.e., that the "closely related to" and "actually caused" portions of the *City of Canton* opinion represent two separate ways of establishing causation in failure to train litigation. *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989); *see also Doe v. Claiborne County, Tennessee*, 103 F.3d 495, 508 (6th Cir. 1996). The panel opinion recited this proposition, but failed to apply it properly. (*Compare* App. B at 7a [citation to *Hill v. McIntyre*] *with* App. B at 9a.)

1983 be formulated to prevent the imposition of *respondeat superior* liability upon local governments. *City of Canton*, 471 U.S. at 391, n.12. This balance creates a difficult causation hurdle for a § 1983 plaintiff to clear as against the local government, but does not mandate in each and every case that the plaintiff show that a different training regime would have produced different results. The "closely related" causation formulation is not so univocal to preclude other proof on the causation issue.

Moreover, this Court, in *City of Canton,* reserved for the factfinder the important and difficult question of whether a well-trained officer would have acted differently. *Id.* at 391. The Sixth Circuit opinion, along with the district court opinion it adopted, answered the key question on summary adjudication without any indication of the justification for a summary answer: "The unfortunate reality is that even additional or better training might not have prevented Defendant Helton's allegedly unconstitutional conduct." (App. D at 29a.) This test does not represent the burden placed upon a § 1983 plaintiff at the summary adjudication stage by this Court in the *City of Canton* case. The district court and the Sixth Circuit both issued opinions that are wrong when measured against this Court's mandate in *City of Canton*.

Finally, the Sixth Circuit's application of *City of Canton* appears to conflict with the decision of the Second Circuit in *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000). In *Jeffes*, the Second Circuit reversed a district court's grant of summary judgment to a county for the failure of its sheriff to train corrections officers not to intimidate other officers in the exercise of their First Amendment rights. *Id.* at 63-64. In reversing the district court's judgment, the Second Circuit stated that the jury should be allowed to decide the failure to

train claim, because the jury could infer from the sustained intimidation campaign of the corrections officers the sheriff's failure to train them to act otherwise. *Id* at 63.

In the present case, both Sheriff Hutchinson and Rodney Paul Bivens (the detention facility commander) acknowledged that the Knox County Sheriff's Department needed training and a policy for the interaction of its officers with mentally ill persons, both gentlemen simply believed that a medical policy sufficed to achieve that goal. In other words, they believed that the only training the law enforcement officers needed to regulate their interaction with mentally ill persons was the training to transfer such persons to the medical staff. (App. I at 68a; App. J at 69a-70a.) It was during just such a transfer, however, in the absence of further training or policy guidance to assist them in the interim, that Knox County's employees caused the death of Warren Brad Carey. *See Gibson v. County of Washoe, Nevada*, 290 F.3d 1175, 1195-1196 (9th Cir. 2002) (medical policy and training that stopped screening of detainees if mentally ill person was combative sufficient to overcome motion for summary judgment by county defendant).

Given Mr. Davidson's unequivocal testimony on causation and the admissions of Messrs. Hutchinson and Bivens, a jury should have been permitted to determine causation and deliberate indifference in this case. The Sixth Circuit's refusal to allow this violates this Court's precedent and appears to disagree with the decision of the Second Circuit.

B. *The opinion of the Sixth Circuit in this case violates its own binding precedent.*

In a seminal case with close factual affinity to the present case, the Sixth Circuit stated:

Finally, plaintiffs offer the testimony of George L. Kirkham, Ph.D., an expert in police procedures. His review of the training offered by the City to police officers led him to conclude that

> none of the involved police personnel understood the appropriate procedures for reacting to mentally ill individuals, . . . a failing which must inevitably be linked to deficient training. Notwithstanding the apparent fact that Sergeant Sizemore as well as Officers Lemker and Scholl had nominally received such training from the available case records, the conclusion is ineluctable that it was not of such a nature as would assure a proper understanding and appropriate response to a situation of this sort.
>
> * * * *

The City would have us disregard the "conclusory" statements of Kirkham, and argue in the alternative that, regardless of Kirkham's testimony, the simple fact that the officers had received some training in a course entitled "Disturbed-Distressed Persons" and that the Department had a policy of handling barricaded persons requires us to find that the training was adequate as a matter of law. To this we cannot agree.

As an initial matter, we do not believe the opinions of experts are to be given no weight by this court, as the City apparently urges. Especially in the context of a failure to train claim, expert testimony may prove the sole avenue available to plaintiffs to call into question

> the adequacy of a municipality's training procedures. To disregard expert testimony in such cases would, we believe, carry with it the danger of effectively insulating a municipality from liability for injuries resulting directly from its indifference to the rights of citizens. Reliance on expert testimony is particularly appropriate where, as here, the conclusions rest directly upon the expert's review of materials provided by the City itself.

Russo, 953 F.2d 1036, 1046, 1047 (6th Cir. 1992).

The testimony of Mr. Davidson in the present case followed the formulation from *Russo* very closely. Mr. Davidson specifically linked the failure of training and guidance to the arbitrary, individualized response that led to the death of Warren Brad Carey. Mr. Davidson specifically stated that the training materials claimed to have been used by the Knox County Sheriff's Department "do not convey enough information to adequately train a new officer about how to manage and deal with mentally ill or emotionally disturbed persons. . . ." (App G. at 58a; *see also* App. F at 57a-60a; App. E at 34a-35a.) Indeed, though Knox County presented an instructor's guide containing training materials on mentally disturbed persons, the actual training syllabus presented by the Knox County Sheriff's Department does not mention any unit on psychological disorders and specifically references a video, not a lecture, under the "special needs inmates" topic. (App. K at 71a-75a.) *Compare with Russo,* 953 F.2d at 1046 (discussing the training provided by the City of Cincinnati, which included a 6-7 hour course on "Disturbed-Distressed Persons).

In forming his opinions, Mr. Davidson reviewed extensive material provided by Knox County. He reviewed, among

other things, the file on the Brad Carey case from the major crimes unit, an inmate statement, the Knox County Sheriff's Internal Affairs Report, the statements of the officers involved given to internal affairs, and the "training" material submitted by Knox County in support of its motion. (The list is at App. F at 46a-48a.) Mr. Davidson further:

1. Offered guidance for what the Knox County Sheriff's Department should have done in order to avoid confrontations such as occurred between its officers and Warren Brad Carey;

2. Testified that the lack of training, policy, rules, and guidelines regarding interaction between law enforcement officers of the Knox County Sheriff's Department and mentally ill persons led to the confrontations and altercations between Knox County Sheriff's Department officers and Warren Brad Carey;

3. Put forth facts and opinions to support the Plaintiff's assertion that the lack of training and/or a specific policy for the interaction between law enforcement officers and mentally ill persons constituted "deliberate indifference" to the constitutional rights of such persons. For example, Mr. Davidson showed, among other things, that the lack of training and a policy placed mentally ill persons at great risk of unnecessary bodily injury by the Knox County Sheriff's Department officers.

(App. E at 33a-35a, 36a, 40a-45a; App. F at 48a-52a; App. G at 58a-60a.) Each of these items met or exceeded the strictures placed upon expert proof in a failure to train case by the *Russo* decision. *See Russo*, 953 F.2d at 1046.

The unpublished decision of the Sixth Circuit in this case contradicts directly and unmistakably the established precedent of the Sixth Circuit. (*See* App. B at 3a-9a.) The existence of 6th Cir. R. 28(g), which, in essence, prevents an unpublished opinion from becoming precedent, apparently provides a way to prevent the panel opinion in the present case from creating a precedential conflict within the Sixth Circuit. *See* 6th Cir. R. 28(g).[15] This rule violates the principle of *stare decisis*, which forms a part of the power granted to the federal judiciary by Article III of the United States Constitution. *See Anastasoff v. U.S.*, 223 F.3d 898, 899-905 (8th Cir. 2000) *vacated as moot* 235 F.3d 1054 (8th Cir. 2000). *Cf. Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.")

As the *Anastasoff* decision demonstrates, a great deal of uncertainty exists in the Circuit Courts of Appeal regarding

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[15] 6th Cir. R. 28(g) provides:

> **Citation of Unpublished Decisions**. Citation of unpublished decisions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case, and that there is no published opinion that would serve as well, such decision may be cited if that party serves a copy thereof on all other parties in the case and on this Court. Such service shall be accomplished by including a copy of the decision in an addendum to the brief.

the precedential status of unpublished opinions. The factual similarity between the present case and *Russo*, as well as the nature of the conflict between the decision of the Sixth Circuit in *Russo* and the present case, present an opportunity to resolve the uncertainty regarding unpublished opinions.

This Court should accept review of this case to prevent the Sixth Circuit's deviation from the doctrine of *stare decisis* and its refusal to comply with Article III of the United States Constitution in respecting its own binding precedent.

CONCLUSION

For the reasons set forth in this petition, a Writ of Certiorari should be granted and this case brought before this Court on its merits. If a Writ of Certiorari is granted, then Petitioner prays that the judgment of the Sixth Circuit Court of Appeals be reversed.

Respectfully submitted,

William Lewis Jenkins, Jr.
Counsel of Record
Attorney for Petitioner
112 W. Court St., P.O. Box 220
Dyersburg, TN 38024
Phone: (731)286-2401
Fax: (731)286-2294

Charles R. Terry
Denise Terry Stapleton
Attorneys for Petitioner
918 W. First North St.
P.O. Box 724
Morristown, TN 37815
Phone: (423)586-5800
Fax: (423)587-4714

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 01-5623
[Filed Aug. 26, 2003]

NORMA CAREY, INDIVIDUALLY AND IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF WARREN BRAD CAREY,
Plaintiff-Appellant,

v.

JASON HELTON, AS CORRECTIONS OFFICER, KNOX COUNTY, TENNESSEE, ET AL.,
Defendants-Appellees.

Before: DAUGHTREY and GILMAN, and GIBSON,* Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit Court of Appeals, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green, Clerk

APPENDIX B

United States Court of Appeals,
Sixth Circuit.

Case No. 01-5623
[Filed July 2, 2003]

NORMA CAREY, INDIVIDUALLY AND IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF WARREN BRAD CAREY,
Plaintiff-Appellant,

v.

JASON HELTON, AS CORRECTIONS OFFICER; KNOX COUNTY, TENNESSEE; and Tim Hutchinson, Knox County Sheriff,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Tennessee.

Before DAUGHTREY, GILMAN, and GIBSON, [FN*] Circuit Judges.

FN* The Hon. John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

PER CURIAM. The plaintiff, Norma Carey, filed this §1983 action against Knox County, Knox County Sheriff Tim Hutchison in his official capacity, and against Officer Jason Helton, both individually and in his official capacity as a corrections officer of Knox County, alleging that the defendants violated the constitutional rights of her son, Warren Brad Carey, who died from heart failure while incarcerated in the Knox County jail. Specifically, Norma Carey claimed that Knox County's failure to train its officers properly to "recognize, handle, and appropriately apply force to mentally ill or emotionally disturbed" detainees caused Officer Helton to use excessive force against Warren Brad Carey, whose bipolar disorder and manic depression led him to resist wildly the officers' attempts to subdue him during the intake procedure and his eventual transfer to the jail's medical unit. Norma Carey also claimed that the county's failure to have an adequate policy respecting the treatment of mentally ill detainees led to the use of excessive force against Warren Brad Carey.

The district court granted summary judgment for the county and the two individual defendants in their official capacities on Norma Carey's policy claim because she offered "no significant probative evidence" that the county maintained "some affirmative policy" that led to the use of excessive force. The district court also granted summary judgment on Carey's failure-to-train claim on the ground that Carey had failed to present an issue of fact as to whether the defendant county was deliberately indifferent to the rights of mentally ill detainees. In this regard, the district court suggested (but did not decide) that Carey had provided insufficient evidence that the training given officers regarding the treatment of mentally ill detainees was in fact inadequate. Having entered judgment for the defendants in their official capacities on Carey's federal claim, the district court dismissed Carey's state law

claims. Thereafter, the plaintiff voluntarily dismissed the claim against Officer Helton in his individual capacity.

On appeal, Carey argues that the district court's decision was in error for a number of reasons, including the district court's failure to apply the appropriate summary judgment standards. We find no error and affirm.

The facts of this case are adequately set out in the district court's able opinion and need not be repeated in detail here. In summary, the record shows that Brad Carey had been arrested for reckless driving and disorderly conduct when he came in contact with Officer Helton during the intake process at the Knox County jail. Unbeknown to the Knoxville officers, Carey was psychotic at the time, suffering through a manic period, and at the jail he became highly uncooperative and self-destructive, banging his head against a plexi-glass wall. To subdue Carey, Helton admittedly delivered a series of knee strikes-- Helton says he aimed the blows at Carey's legs in an attempt to bring him down, but the plaintiff alleges that the blows landed on the upper part of Carey's body. After Carey was put in his cell, the jail officials received a call from his mother, explaining that her son was mentally ill and had been off his medication for a matter of weeks. As a result, the officer on duty directed the jail staff to move Carey to the medical unit for observation and evaluation. Carey, predictably, resisted and again had to be subdued. Once in the medical unit, he was in such obvious physical distress that an emergency call was issued to transport Carey to the hospital. When the emergency medical personnel arrived, Carey was unconscious, had no pulse, and had no discernible heartbeat. He was pronounced dead the following day, from a heart attack. The medical examiner concluded that Carey had died of natural causes associated with atherosclerotic heart disease, commonly referred to as

hardening of the arteries. The autopsy report also noted the presence of various injuries, contusions, and abrasions to the decedent's chest, head, and face. The plaintiff offered the testimony of a former state medical examiner, who speculated, based on the autopsy report, that Brad Carey's death was actually caused by the blows that he received while struggling with officers, which "caused his blood pressure to go up," in turn causing ... transient hypertension, which caused at least one of the capillaries or small blood vessels running through the plaque to rupture causing acute hemorrhage, bleeding, into the plaque, and the plaque swelled because of this accumulation of blood, and the swollen plaque blocked the lumen or the hole through which blood runs in the center of the artery such that blood did not flow to the heart muscle that it needed to and it caused the heart muscle to have a shortage of oxygen and to become ischemic; that is, to show changes consistent with loss of oxygen, and caused the initial phases of a heart attack, and that this heart attack in and of itself is the immediate cause of his death.

This witness did not think that the decedent's manic activity alone could have elevated his blood pressure high enough to cause his death, and although he opined that Brad Carey's heart attack was ultimately the result of "blunt trauma," it is not clear from the record how he was able to distinquish between Carey's self-inflicted injuries, those necessarily suffered as he resisted the actions of the officers, and those alleged to have been the product of excessive force.

We conclude without hesitation that the district court was legally correct in granting summary judgment to the defendants on Norma Carey's claims against the county and the other two defendants in their official capacities, because the plaintiff offered no significant probative evidence that the county maintained an affirmative policy regarding the

handling of mentally ill detainees that led to the use of excessive force against the decedent. Moreover, despite the fact that the plaintiff's failure-to-train claim presents a closer question, we agree with the district court's holding that the record fails to establish an issue of fact as to whether the county was liable under the standard set out in *City of Canton v. Harris*, 489 U.S. 378 (1989).

Because a plaintiff cannot rely on *respondeat superior* to hold a municipality liable under § 1983, see *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), she must show that the municipality's policy (or lack thereof) was a "moving force" in the deprivation of the plaintiff's rights and arose from "deliberate indifference" to the plaintiff's rights. *See Doe v. Claiborne County, Tennessee,* 103 F.3d 495, 508 (6th Cir.1996). Likewise, to prevail on a failure-to-train claim under § 1983, the plaintiff must prove: "that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city's deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir.1989). Liability cannot be imposed unless "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the [governmental body] can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. 378, 390.

On the question of adequacy of training, the defendants presented the testimony that Knox County followed the guidelines of the Tennessee Corrections Institute dealing with special needs inmates, which included treatment of emotionally or psychologically disturbed persons. The defendants also produced an instructor's guide describing

various psychological disorders that officers are likely to encounter in inmates and guidelines for handling mentally ill inmates. Norma Carey did not provide any evidence that directly refuted testimony that these instruction materials were in fact used. Although Officer Helton testified that he did not remember any training specifically regarding mentally ill detainees, such testimony, standing alone, has been held insufficient to defeat summary judgment. See *Russo v. City of Cincinnati*, 953 F.2d 1036, 1049 (6th Cir.1992)(Wellford, J., concurring); see also *Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir.1998) (upholding grant of summary judgment for defendants on failure-to-train claim where "[t]he record shows that all the officers had received extensive training" and noting that "[a]llegations that a particular officer was improperly trained are insufficient to prove liability"); *City of Canton*, 489 U.S. at 390-91 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program."). Likewise, the fact that Helton did not recognize that Carey was mentally ill, despite a number of glaring indications, does not, in itself, demonstrate that the training was inadequate.

Finally, although an expert witness for the plaintiff testified that the training materials were inadequate, the district court properly disregarded this testimony as too conclusory to defeat summary judgment.

Even if we were to find that the plaintiff had created a genuine issue of material fact as to the adequacy of the county's training, the district court correctly concluded that the plaintiff failed to produce sufficient evidence to create an issue "as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates." The district court rested its

conclusion in part on the fact that no evidence had been presented regarding a pattern of similar violations in the past by the department, nor any evidence that Helton was prone to using excessive force against mentally ill inmates or inmates in general. As to the third factor, the district court did not directly address the issue of causation. But neither did the plaintiff. Although she asserts on appeal that inadequate training regarding mentally ill inmates caused Helton's use of excessive force against Carey, she has not spelled out in the district court or in her brief before this court her theory regarding a crucial question in the causation chain: "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *City of Canton*, 489 U.S. at 391. This deficiency alone would establish a sufficient basis for the entry of summary judgment in favor of the defendants. Finally, we find no error in the district court's order dismissing the plaintiff's state claims. The decision whether to exercise supplemental jurisdiction over a plaintiff's state law claims rests within the discretion of the district court and will be reversed only for abuse of discretion. See *Weeks v. Portage County Executive Offices*, 235 F.3d 275, 279-80 (6th Cir.2000). None appears in the record before us. For the reasons set out above, as well as the reasons stated in the district court's memorandum opinion filed on April 19, 2001, we AFFIRM the order granting summary judgment to the defendants.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

Case No. 3:99-cv-536
JUDGE CURTIS L. COLLIER
[Filed Apr. 19, 2001]

NORMA CAREY, individually and in her capacity as the Administratrix of the Estate of Warren Brad Carey, Plaintiff,	)
v.	)
JASON HELTON, individually and in his official capacity, KNOX COUNTY, TENNESSEE, and TIM HUTCHINSON, in his official capacity, Defendants.	)

ORDER

In accordance with the accompanying Memorandum, the Court GRANTS the motion for summary judgment filed by Defendants Helton and Hutchison, in their official capacities, and Defendant Knox County as to Plaintiff's cause of action under 42 U.S.C. § 1983. The Court DECLINES to exercise

supplemental jurisdiction over Plaintiff's state law as to these Defendants. The Court also DISMISSES Plaintiff's § 1983 claim brought in her individual capacity. Remaining before the Court are Plaintiff's federal and state claims against Defendant Helton, individually.

SO ORDERED.

ENTER:

/s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

Case No. 3:99-cv-536
JUDGE CURTIS L. COLLIER
[Filed April 19, 2001]

NORMA CAREY, individually and in her capacity as the Administratrix of the Estate of Warren Brad Carey, Plaintiff,	)
v.	)
JASON HELTON, individually and in his official capacity, KNOX COUNTY, TENNESSEE, and TIM HUTCHINSON, in his official capacity, Defendants.	)

MEMORANDUM

Plaintiff Norma Carey brings this civil rights action to vindicate the alleged violation of the civil rights of her son, Decedent Warren Brad Carey, by Defendant Jason Helton, individually and in his official capacity as a corrections officer for Knox County, Tennessee, Defendant Timothy Hutchison,

in his official capacity as sheriff of Knox County, Tennessee, and Defendant Knox County, Tennessee ("Knox County"). Because Plaintiff sues under 42 U.S.C. § 1983, as well as various Tennessee statutes, the Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Before the Court is a motion for summary judgment filed by Defendants Helton and Hutchison, in their official capacities, and Defendant Knox County (Court File No. 15). In disposing of this motion, the Court has considered Defendants' supporting memorandum (Court File No. 16), the response of Defendant Helton, individually (Court File No. 19), Plaintiff's response (Court File Nos. 20-21), and Defendants' reply (Court File No. 23).

For the following reasons, the Court will **GRANT** the motion for summary judgment and **DISMISS** Plaintiff's federal claim against Defendants Helton and Hutchison, in their official capacities, and Defendant Knox County. Furthermore, because Plaintiff's federal claim against these Defendants will be dismissed, the Court will not exercise supplemental jurisdiction over Plaintiff's state law claims against Defendants Hutchison and Knox County. Plaintiff's federal and state law claims against Defendant Helton, individually, will be tried before a jury on May 21, 2001.

STANDARD OF REVIEW

Under Rule 56(c) of the *Federal Rules of Civil Procedure*, the Court will render summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden is on the moving party to conclusively show no genuine issue of material fact exists. *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Kentucky Div., Horsemen's Benevolent & Prot. Ass'n, Inc. v. Turfway Park Racing Ass'n, Inc.*, 20 F.3d 1406, 1411 (6th Cir. 1994). The Court must

view the facts and all inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Oakland Gin Co. v. Marlow*, 44 F.3d 426, 429 (6th Cir. 1995); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 250 (6th Cir. 1994).

Once the moving party presents evidence sufficient to support a motion under Rule 56, the nonmoving party is not entitled to a trial merely on the basis of allegations. The nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20F.3d at 1411; *see also Guarino v. Brookfield Township Trs.*, 980 F.2d 399, 404-06 (6th Cir. 1992)(holding courts do not have the responsibility to search the record *sua sponte* for genuine issues of material fact). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323.

The Court determines whether sufficient evidence has been presented to make the issue of fact a proper question for the jury, but does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435-36 (6th Cir. 1987). The standard for summary judgment mirrors the standard for directed verdict. The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. There must be some probative evidence from

which the jury could reasonably find for the nonmoving party. If the court concludes a fair-minded jury could not return a verdict in favor of the nonmoving party based on the evidence presented, it may enter a summary judgment. *Id.; Lansing Dairy*, 39 F.3d at 1347; *Horsemen's Benevolent*, 20 F.3d at 1411.

RELEVANT FACTS

A. Decedent's Death

Warren Brad Carey ("Decedent") suffered from a bipolar disorder and manic depression. On January 3, 1999, Decedent experienced and episode of psychosis and mania. He was arrested that day by a Knoxville police officer for reckless driving and disorderly conduct and transported to the Knox County Detention Facility ("Jail"). When Decedent arrived at the Jail around 8:00 p.m., Defendant Helton was working the intake/release security detail. Decedent, who apparently was still psychotic and manic throughout the relevant time period, was uncooperative and self-destructive when he arrived, screaming and banging his head against a plexi-glass wall. During the course of an intake frisk, Defendant Helton (by his own admission) administered a "knee-strike" to Decedent in an apparent attempt to restrain him. Defendant Helton (by his own admission) administered two more knee strikes to Decedent later on during the intake procedure. There is some dispute about where on Decedent's body the knee strikes landed. Defendant Helton says he struck Decedent's legs, while Plaintiff contends he struck Decedent's midsection, shoulders, and head. (For the purposes of the summary judgment motion, the Court views the facts in the light most favorable to Plaintiff.) Decedent was then taken to Building 6, Pod C and placed in a Cell 101.

At some point after Decedent had been placed in his cell, Decedent's mother spoke with Corporal Gabe Mullinax, the intake unit supervisor, advising him of her son's mental illness and his failure to take his medicine for the previous two weeks. After a preliminary medical assessment of Decedent had been preformed, Corporal Mullinax ordered the Jail staff to move Decedent to the Jail's medical unit for observation and further evaluation. At approximately 10:20 p.m., Defendant Helton and four other corrections officers entered Decedent's cell. According to Plaintiff, the officers dragged Decedent off his bed. A violent struggle ensued during the move. Officer David Brown observed Defendant Helton administer two knee strikes to Decedent's back and kick Decedent in the head. Officer Andy Collins observed Defendant Helton administer a knee strike to Decedent's head. Plaintiff alleges Defendant Helton also slammed Decedent's head onto the concrete floor. (Defendant Helton disputes his colleagues' observations and Plaintiff's allegation.) Corporal Millinax also sprayed Decedent's face with FREEZE-P spray. Having subdued him, the officers laid Decedent face down on the floor of a cell in the medical unit.

When the officers removed the restraints they had placed on Decedent, they noticed a pool of blood had formed under his head and he was pale and bluish. They then summoned emergency medical technicians ("EMT") to transport Decedent to a hospital. When the EMTs arrived, they found Decedent unconscious, without a pulse, and with no discernible blood pressure. The EMTs observed blood on the floor and the walls. The EMTs administered emergency care and transported Decedent to St Mary's Medical Center.

Decedent was pronounced dead in the early morning of January 4, 1999. The reported cause of death was cardio-

pulmonary arrest. The medical examiner determined Decedent died of natural causes associated wit atherosclerotic heart disease. Decedent had suffered numerous physical injuries, including multiple bilateral rib and sternal fractures, multiple abrasions, contusions, and lacerations to the chest and heart area, and contusions and lacerations to his upper extremities, including his face and head.

B. Department's Investigation of Defendant Helton

The Knox County Sheriff's Department ("Department") conducted an investigation of Decedent's death, focusing in particular on Defendant Helton's use of force against Decedent (Court File No. 15, Exh. 1, Internal Affairs Mem.). The use of knee strikes, other than those administered to the thigh, is contrary to the policy of the Department when used for the purpose of controlling an inmate. Department policy allows officers to use knee strikes to other body parts only in self-defense. Defendant Helton admits he delivered three knee strikes in self defense but denies any other knee strikes or administering any knee strikes to control Decedent. The Department, however, found Defendant Helton had used knee strikes to control Decedent. Accordingly, the Department disciplined him for the use of inappropriate knee strikes. However, the Department did not find he had used excessive force.

C. Department's Procedures for Handling Mentally Ill Inmates

The Department has separate set of procedures for handling mentally ill inmates. Rather, the General Medical Services subsection of the Department's general Policy and Procedure Manual includes procedures concerning the

provision of mental health services to inmates. These procedures include, in relevant part, the following

> 3.The inmate pre-admission screening form addresses specific questions in regards to the inmate's mental health. If the Intake Officer notices any unusual responses to questions or behavior that would hinder the inmate's adaption to the correctional environment, they will notify [the Jail's] medical [staff] immediately.
>
> ....
>
> 6.If the inmate is stable and cooperative he/she will be housed in the special needs pod and referred to Helen Ross McNabb Center for follow up while incarcerated.
>
> 7.If the inmate is combative and uncooperative they will be housed in the therapeutic isolation room, and Mobile Crises will be called to evaluate the inmate.
>
> 8.If the inmate is out of control and medical is concerned for the inmate's safety, or the safety of staff personnel, Mobile Crisis will evaluate the inmate for emergency placement in Lakeshore or to remain in isolation with observation, and follow up with Helen Ross McNabb with the next 24 hours.
>
> ....

All officers will be given information on any inmate housed in the infirmary or special needs pod. *All personnel will observe the inmate for unusual behavior. If any abnormal behavior(s) are noted, the officers will notify medical immediately.*

(Court File No. 15, Exh. 11, Attachment 1, at 8-9 (emphasis added)). According to Pete Garza, the facility commander for the Jail, these procedures were in effect on January 3, 1999 (Court File No. 15, Exh. 11, Pete Garza Aff., ¶ 3).

The parties disagree about the nature and level of training the Department gives its corrections officers on handling emotionally disturbed inmates and on recognizing "unusual behaviors." Defendants say the Department gives four hours of such training each year to current officers and includes the training in its orientation of new officers. Mr. Garza testified the Department's training program followed "the guidelines of the TCI, Tennessee Corrections Institute, which dealt with special needs inmates, as well as... emotionally and psychologically disturbed or mentally disturbed persons" (Court File No. 15, Exh. 13, Garza Dep., at 8, 19-20). Defendants submitted an excerpt of a document entitled "Instructor's Guide," which is a lesson plan concerning psychological disorders (Court File No. 15, Exh. 11, Attachment 4). According to Mr. Garza, the lesson plan was used in the training of new officers (Court File No. 15, Exh. 3, Garza Dep., at 8-9, 19, Exh. 11, Garza Aff., ¶ 5). According to Dorothy Pinkston, the head of the Jail's medical unit, the Jail's medical staff received separate and more specific training on handling mentally disturbed inmates (Court File No. 15, Exh. 10, Pinkston Dep., at 10-11). The bottom line of the Department's mental health training appears to be that correctional officers were trained to report "disturbed" behavior to their supervisors or to the Jail's medical staff but that assessment of the inmate's behavior was left to the Jail's medical staff (Court File No. 15, Exh. 3, Garza Dep., at 10-18).

Defendant Helton testified he never received specific training on handling mentally disturbed inmates, apparently

as a recruit or as a current officer (Court File No. 22, Un-Numbered Exh., Helton Dep., at 54, 82). Rodney Biven , the Jail commander similarly testified he could not recall any specific training for corrections officers on handling mentally disturbed inmates (Court File No. 22, Un-Numbered Exh., Bivens Dep., at 16).

Plaintiff counters Knox County's proof with the testimony of Phillip Davidson, a lawyer and proffered expert in police procedures.[1] Mr. Davidson testified the documents submitted by Knox County "do [] not contain any guidance, guidelines, or standards to which deputies or non-medical personnel can conform their behavior when dealing with mentally ill or emotionally disturbed persons (Court File No. 22, Un-Numbered Exh., Davidson Aff. ¶ 4(a)). He further opined the training materials "contain so little meaningful assistance to a new officer, that to teach from these documents exhibits deliberate indifference to the bodily integrity and safety of those mentally ill or emotionally disturbed persons that come into contact with the Knox County Sheriff's Department" (*Id.* ¶ 4(b)). Mr. Davidson also noted the documents acknowledge many inmates have mental illnesses (Id. ¶ 5).

DISCUSSION

Plaintiff's lawsuit states two theories in support of her cause of action under 42 U.S.C. § 1983. Count One avers

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[1]For the purposes of this summary judgment motion, the Court assumes Mr. Davidson's opinion would be admissible as evidence at trial. See FED.R. CIV. P. 56(e). However, Mr. Davidson's qualification to offer opinion on Knox County's procedures for handling mentally ill inmates appears suspect. Moreover, some of Mr. Davidson's proffered opinions appear to invade the province of the jury.

Defendant Helton used excessive force to subdue Decedent, thereby violating Decedent's rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.[2] Count Three avers Defendants Hutchison and Knox County violated Decedent's rights under the Fourth, Eighth, and Fourteenth Amendments by maintaining certain policies, procedures, customs, and common practices that directly lead to Defendant Helton's use of excessive force to subdue Decedent or, in the alternative, by failing to train correction officers on the handling of inmates suffering from mental illnesses.

Plaintiff's lawsuit also presents three state law claims. Count Two avers Defendant Helton individually committed the international torts of assault and battery on Decedent; this claim is not at issue in the motion before the Court. Count Four, which is brought under *Tennessee Code Annotated* §§ 8-8-301 to -303 and § 41-4-101, avers Defendants Hutchison and Knox County are liable for the actions of Defendant Helton. Count Five, which states a claim under Tennessee Governmental Tort Liability Act, TENN. CODE ANN. §§ 29-20-101 *et seq.*, avers Defendant Knox County is liable for the negligence of Defendant Helton.

Defendants Helton and Hutchison in their official capacities and Defendant Knox County now move the Court for summary judgment on all claims except those against Defendant Helton, individually.

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[2]Although Knox County states Plaintiff's first claim targets Defendant Helton in his official capacity, the Court construes it as targeting him both individually and officially. See *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

A. Standing

A cause of action brought under § 1983 is personal to the direct victim of the alleged constitutional tort. *Claybrook v Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000). "[O]nly the purported victim, or his estate's representative(s), may prosecute a section 1983 claim; conversely, no cause of action may lie under section 1983 for emotional distress, loss of a loved one, or any other consequent collateral injuries allegedly suffered personally by the victim's family members." *Id.* Hence, Plaintiff has standing to bring this lawsuit only in her capacity as administratrix of Decedent's estate. Accordingly, the Court must DISMISS Plaintiff's individual § 1983 claim against all Defendants.

A claim brought under 42 U.S.C. § 1983 against an individual in his official capacity is treated as an action against the governmental entity that employs him. *Hafer v. Melo*, 502 U.S. 21, 25(1991); *Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985); *Claybrook*, 199 F.3d at 354. Hence, the Court will treat Plaintiff's § 1983 claim against Defendants Helton and Hutchison in their official capacities as claims against Knox County. Accordingly, the Court will **GRANT** Defendants' motion for summary judgment on Plaintiff's § 1983 claim against Defendants Helton and Hutchison in their official capacities and DISMISS that claim as to those defendants in their official capacities.

B. Federal Civil Rights Claims

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ..., subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law ....

42 U.S.C. § 1983. "To successfully state a claim under 42 U.S.C. § 1983, a plaintiff must identify a right secured by the United States Constitution and the deprivation of that right by a person acting under color of law." *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994) (citation omitted). A plaintiff must then show the defendant's constitutional violation caused her injury. *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 910 (6th Cir. 1995). Furthermore, in the context of a § 1983 action, a plaintiff may not rely on the doctrine of superior to prove the liability of a municipal defendant. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691 (1978); *Jones v. City of Memphis*, 586 F.2d 622, 623 (6th Cir. 1978). Rather, to state a § 1983 claim against a municipality, a plaintiff must show the injury was caused by an unconstitutional "policy" or "custom" maintained by the municipality. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986).

Plaintiff claims Defendant Knox County violated Decedent's constitutional rights by maintaining certain policies, procedures, customs, and common practices that directly lead to Defendant Helton's use of excessive force to subdue Decedent. In the alternative, Plaintiff claims Defendant Knox County violated Decedent's constitutional rights by failing to train its correction officers on the handling of inmates suffering from mental illnesses.

Plaintiff has offered no significant probative evidence showing Defendant Knox County maintained affirmative policies, procedures, customs, and common practices that could be construed as directly leading to the use of excessive force on the part of its employees. Nor has Plaintiff refuted

Knox County's proffered evidence of its policies on the use of force. Accordingly, the Court will construe Plaintiff's silence as a concession of the lack of merit of her theory that Knox County maintained some affirmative policy encouraging or allowing the use of excessive force.

In the face of Defendant's motion for summary judgment, Plaintiff appears to rely exclusively on her alternative theory to prove her § 1983 cause of action – that Defendant Knox County's failure to train its corrections officers on the proper handling of inmates with mental illnesses amounts to an unconstitutional policy. Under limited circumstances, failure to train can constitute grounds for municipal liability under § 1983. *City of Canton v. Harris*, 489 U.S. 378, 387 (1989) (addressing the city's failure to provide training to inform its officers' exercise of their discretion in deciding when to summon medical care for injured detainees). However, "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact." *Id.* at 388; *see also Monell*, 436 U.S. at 694 (holding that a municipality can be liable under § 1983 only where its policies are the "moving force [behind] the constitutional violation"); *Pembaur*, 475 U.S. at 483-84 ("[M]unicipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives [by municipal policymakers].").

"To establish liability under [Harris], 'the plaintiff must prove ... [(1)] that the training program at issue is inadequate to the tasks that officers must perform; [(2)] that the inadequacy is the result of the city's deliberate indifference; and [(3)] that the inadequacy is 'closely related to' or 'actually cause' the plaintiff's injury.'" *Russo v. City of Cincinnati*,

953 F.2d 1036, 1046 (6th Cir. 1992) (quoting *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989)). Whether a training program for particular employees is adequate depends on the tasks assigned to those employees. *Harris*, 489 U.S. at 390. Inadequate training does not automatically give rise to a finding of deliberate indifference. Rather, such a finding must rest on a conclusion that the need for more or different training is "obvious" because of the likelihood of a constitutional violation in the absence of such training, given the tasks assigned. *Id.* (noting that, in the face of something so obvious, inadequate training "may fairly be said to represent a policy for which [a municipality] is responsible"). Finally, § 1983 liability also requires a showing that the inadequate training "must be closely related to the ultimate injury." *Id.* at 391 (explaining that the relevant inquiry is whether "the injury [would] have been avoided had the employee been trained under a program that was not deficient in the identified respect"). The Court offered the following example:

> [C]ity policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights.
>
> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Id. at 390 n.10.

In analyzing the adequacy of a training program for the purpose of assessing § 1983 liability, the fact finder should not focus on the faulty training a particular officer may have received. *Id.* Nor should it be swayed by proof additional or better training could have prevented conduct causing a particular injury. *Id.* Moreover, in the absence of notice that a training program is inadequate, a fact finder must not presume the municipality was deliberately indifferent. *Sargi v. Kent City Board of Educ.*, 70 F.3d 907 (6th Cir. 1997). In short, the fact finder must differentiate between, on the one hand, harmful conduct stemming from inadequate training about which the municipality had notice and, on the other, harmful conduct perpetrated by an otherwise adequately trained officers. Only if the harmful conduct is rooted in inadequate training, and only if there is a causal link between the injury and the inadequate training, can a municipality by liable. The imposition of "a lesser standard of fault would result in *de facto respondeat superior* liability on municipalities." *Id.* at 392; *Monell*, 436 U.S. at 693-94.

The United States Court of Appeals for the Sixth Circuit addressed the intricacies of assessing liability in failure-to-train claims in *Russo v. City of Cincinnati*. 953 F.2d 1036 (Jones, J., writing for the panel; Welford, J., concurring as to all parts; Suhrheinrich, R., dissenting as to the court's opinion on the failure to train claim). In that case, a paranoid schizophrenic on leave from a care facility barricaded himself in an apartment. The Cincinnati police officers who went to the apartment were told the decedent was "suicidal, homicidal, and a hazard to the police." *Id.* at 1039. After a stand-off, the police forced the apartment door open and fired a stun gun at the decedent, who was holding two knives. When the decedent lunged toward them, the police fired their

service revolvers at him. He was shot twenty-two times and later died. The Cincinnati Office of Municipal Investigation ("OMI") criticized the officers' response to the situation, focusing on one officer's failure to implement proper procedures for handling barricaded persons and his improper use of his stun gun. The OMI report found the officers' use of their revolvers was justified by self-defense. The report concluded, however, that the city's training of its officers for dealing with mentally ill persons was "inadequate" and "virtually non-existent" *Id.* at 1041. Apparently, the police operations manual outlined procedures for dealing with barricaded persons but not mentally ill persons.

The decedent's family sued under § 1983, alleging the city had failed to train its officers in the handling of mentally disturbed persons. An expert testified the officers' ignorance of "appropriate procedures for reacting to mentally ill individuals" was "inevitably linked to deficient training." *Id.* at 1047. The expert based his opinion, at least in part, on the OMI report. The city explained it "offers a 6-7 hour training seminar to its officers entitled Disturbed-Distressed Persons" and "provides guidance to officers in handling of mentally-ill individual and potential suicides" through its police procedures manual. *Id.* at 1046. The district Court granted summary judgment to the city.

A divided panel of the Sixth Circuit reversed the district court's decision. The court explained the proof of the training seminar and the procedures manual had to be balanced against the proof of the OMI report and the expert testimony. In particular, the court found "a seven-hour course entitled 'Disturbed-Distressed Persons' [was] insufficient in and of itself to shield the City from liability." *Id.* at 1047. The court further found "the mere fact that the City had a policy of dealing with barricaded persons" was not

"conclusive proof that it was not deliberately indifferent to the rights of individuals in [the decedent's] position." *Id.* Accordingly, the court held the city had not established there was no genuine issue of material fact as to whether the content of its training was adequate or whether any lack of training amounted to deliberate indifference. *See id.* (citing *Leach v. Shelby County Sheriff*, 891 F.2d 1241 (6th Cir. 1989), a case concerning the historically inadequate treatment of at least fourteen paraplegic prisoners at the Shelby County jail).

Judge Wellford emphasized "the narrow area of liability" of municipalities on failure-to-train claims. *Id.* at 1048 (Wellford, J., concurring). The sole issue in *Russo* was "whether the City has trained its police officers properly in the use of deadly force" in circumstances involving mentally ill persons. *Id.* This inquiry required the fact finder to determine whether "the inadequacy of training was so likely to result in the constitutional injury to mentally ill persons, that the City's policymakers could be deemed to be callous and indifferent to the need for training in that area." *Id.* While stating the plaintiffs probably could not carry this burden on the shoulders of their expert alone, Judge Wellford noted the plaintiffs also had the OMI report working in their favor. Hence, even though the city had proof of some training, Judge Wellford concluded the plaintiffs had at least presented a question of fact.

In this case, the issue is more general than in *Russo* – whether Knox County has adequately trained its corrections officers properly to recognize and interact with mentally ill persons. Knox County argues the portion of its training program dealing with mentally ill inmates was adequate, pointing to its procedures manual and the lesson plans it uses to train its corrections officers. Plaintiff argues the training

program was not adequate, proffering the opinion of an expert who found Knox County's training not meaningful. The Court finds the testimony of Plaintiff's expert does not, alone, provide sufficient probative evidence to support Plaintiff's claim. It simply offers conclusions without articulating clear factual support for them. Unlike *Russo*, moreover, the expert's testimony is neither substantially based on nor supported by an internal review critical of Knox County's training program.

In any event, the Court need not conclude there is no genuine issue of material fact as to whether the training program was adequate, for Plaintiff has not presented sufficient evidence to create an issue as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates. Knox County's internal investigation of Decedent's death criticized Defendant Helton's use of force as a violation of Department policy. Unlike the situation in *Russo*, however, the report did not otherwise fault the Jail staff's handling of Decedent. Moreover, again unlike *Russo*, there is evidence Knox County maintained procedures for handling mentally ill inmates and conducted at least rudimentary training for its correctional officers on these procedures. The Court does not doubt the training could be improved. But this is not the test. What is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*. The unfortunate reality is that even additional or better training might not have prevented Defendant Helton's allegedly unconstitutional conduct.

At the same time, Plaintiff has presented no evidence suggesting Knox County should have known Defendant Helton was prone to using excessive force or treating mentally ill inmates poorly. Indeed, unlike *Leach*, there is no evidence Knox County had notice of a pattern of mistreatment of mentally ill inmates by any correctional officers at the Jail. On the contrary, Plaintiff alleges only mistreatment by Defendant Helton. Under the holdings of *Harris* and *Sargi*, such circumstances will not support a finding that Knox County's training was deliberately indifferent to the constitutional rights of inmates and constituted an official policy. Accordingly, the Court will **GRANT** Defendant Knox County's motion for summary judgment as to Plaintiff's § 1983 cause of action.

C. State Law Claims

Because the Court has granted Defendant Knox County's motion for summary judgment as to Plaintiff's federal cause of action, the Court will decline to exercise supplemental jurisdiction over Plaintiff's state-law claims against Defendant Knox County and Defendants Helton and Hutchison, in their official capacities. "A district court has broad jurisdiction in deciding whether to exercise supplemental jurisdiction over state law claims." *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1254 (6th Cir. 1996). In determining whether to exercise supplemental jurisdiction, courts must consider judicial economy, convenience, fairness, and comity. *Id.* "When all federal claims are dismissed before trial, the balance of considerations usually will point to dismissing the state law claims, or remanding them to state court if the action was removed." *Id.* at 1254-55.

IV. CONCLUSION

For the reasons stated above, the Court will GRANT the motion for summary judgment filed by Defendants Helton and Hutchison, in their official capacities, and Defendant Knox County as to Plaintiff's cause of action under 42 U.S.C. § 1983. The Court will also DISMISS Plaintiff's § 1983 claim brought in her individual capacity for lack of standing. The Court will decline to exercise supplemental jurisdiction over Plaintiff's state law causes of action as to Defendants Helton and Hutchison, in their official capacities, and Defendant Knox County. Remaining before the Court are the federal and state claims brought by Plaintiff against Defendant Helton, individually.

/s/ Curtis L. Collier
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX E

[Excerpts from the Deposition of Phillip L. Davidson, October 20, 2000]

Mr. Melson: Now then, did the Knox County Sheriff's Department possess a policy regarding handling mentally disturbed persons?

Mr. Davidson: No.

Mr. Melson: Should they have possessed such a policy?

Mr. Davidson: Yes.

Mr. Melson: Upon what do you base that opinion?

Mr. Davidson: I base that upon my experience with every law enforcement officer agency in the State of Tennessee, my education and training, my knowledge of law enforcement procedures.

Mr. Melson: Have you ever – I think you've told us actually you have authored such a policy, have you not?

Mr. Davidson: Yes.

Mr. Melson: Or directive, policy directive –

Mr. Davidson: Yes.

Mr. Melson: -- dealing with that topic? And that's the one you did not only while at the Nashville Police department Training Academy, but also the Tennessee State Law Enforcement Training Academy?

Mr. Davidson: Let me back up a little bit because it's been a while since I did this. That policy may have also been made into a formal policy of the Metropolitan Police Department. I simply don't remember. It's been a long time. There were a lot of things that we did that actually ended up becoming policies, like the hostage policy. Just a bunch.

Mr. Melson: What policy should the Knox County Sheriff's Department have in place, in your opinion, in January of 1999 as respects the handling of mentally disturbed people at the jail or Detention Center?

Mr. Davidson: Well, I don't think it makes any difference whether it's at a jail, Detention Center, on the street or a downtown bar. They should have had a policy that dictated what officers were to do and how they were to handle persons, who are – who they suspect is suffering from some type of mental illness.

Mr. Melson: And what should that policy have specifically encompassed as respects those topics?

Mr. Davidson: Well, it should have basically given the officers the direction of how they were to handle these people, you know, what type of force they were to use on them, how they were to approach them. And I think if they'd have set it up in that manner, given the officers some guidelines to work, with, I think it would have reduced what happened here that night considerably.

Mr. Melson: What guidelines should have existed specifically?

Mr. Davidson: Well, they should have told the officers, first of all, here's what you do when you recognize a person exhibiting certain symptoms. They should have outlined the symptoms for them. And then they should have said here's what our policy's going to be when we deal with these people. Now, what that policy is, that's up to the Sheriff of that sheriff department. How are we going to deal with these people? Are we going to take them to a different treatment location? Are we going to – how are we going to react to them? For instance, you react to these people in a different way than you do a normal drunk. And that's what

basically happened here. My just reading of all the depositions and how this guy was reacted to is that they were treating this guy as if he was a "normal person" you may bring in, let's say someone from a DUI suspect. And, of course, trying to reason with people, who are suffering from mental illness, is like trying to reason with someone from Mars. They have no idea what you are saying to them, and they treat every type of authority as being hostile, and they are going to react in an aggressive manner. And I think that's what happened here. This guy should have been treated a lot differently. He should have been not subjected to use of force simply because he was not following commands because he wasn't going to follow commands. And the force that should have been used against him is something called mass. That's where you apply a lot of people to a guy so you don't have to hurt him. When you apply one or two guys to somebody that's agitated you're going to be forced into excessive force at some point, see, and that's the purpose of the policy. What you've got to do is you've got to have enough people like they did here one time, they have six officers, six people - six grown deputies should have been able to control this guy without any problem at

all, without having to strike him or do anything to him. And that strike in my opinion was simply a coup de grace for somebody that was out of control about what was happening here.

Mr. Melson: And that was who?

Mr. Davidson: Helton. Helton exhibited this all through this scenario here.

So the policy – what it does, it also – it protects the officer to have a policy like that, because then, you know, the officer has to say I have a certain guideline that I am supposed to follow. It protects the department, the officer and the individual. When you leave guys alone to make the decision what to do, they're going to do it according to their personalities. And, I mean, you can just see the difference in my opinion reading these depositions of this guy Stanley here, how he reacted to this whole situation, and then again how Helton reacted to it. It's like night and day.

Mr. Melson: Are there any other policies that existed in the Knox County Sheriff's Department, Mr. Davidson, in January 1999 that were violated other than the policy regarding the use of force?

Mr. Davidson: Well, there was a policy there that told the nursing staff what to do when an individual was known to be suffering

some type of mental psychiatric disorder. I'm not here today to try to judge the nursing staff. I wasn't asked to do that. But obviously that policy may have been violated. I don't know. No, I haven't been asked to look at that. There's certainly a question whether the nursing staff did what they should have done in this situation.

Mr. Melson: Do you anticipate looking at that issue in this case –

Mr. Davidson: No.

Mr. Melson: -- and offering testimony?

Mr. Davidson: No, I don't anticipate that at all.

Mr. Melson: Set me straight and help me understand what specific policy or policies, if any, other than the Knox County Sheriff's Department's use of force policy as it existed in January 1999, was violated in connection with the events that concern this case involving Mr. Carey?

Mr. Davidson: Well, the use of force policy in my opinion was violated.

Mr. Melson: Were there any other polices that were violated?

Mr. Davidson: I didn't see any other policies.

Mr. Melson: Now then, you've told us in addition – all right, so it's accurate for us to understand as we leave Nashville here and prepare to continue with the work in this case, that you have an opinion that only one policy of the Knox County Sheriff's Department, as it existed in January of 1999, was violated in this case, and that was the department's use of force policy, correct?

Mr. Davidson: No. I'm not saying that, because I haven't been asked to look at any other policies that dealt with something – for instance, like we talked about, there was a policy about what the nursing staff was supposed to do.

Mr. Melson: But you've just told me you don't anticipate –

Mr. Davidson: I understand. You are asking me a question there, was there another policy violated. I don't know if there was another policy violated. The ones I saw, that's it.

Mr. Melson: Let me help you and see if we can narrow it down in a fashion that you're comfortable with. The only opinion that you hold today and the you anticipate offering at the trial of this case, that concerns an alleged violation of an existing policy of the Knox County Sheriff's Department that existed in January 1999,

concerns your belief that the department's use of force policy was violated in this case, is that true?

Mr. Davidson: Yes.

Mr. Melson: Are there, apart from the department's use of force policy, do you have an opinion that any other policy of the Knox County Sheriff's Department was violated in this case, which opinion you anticipate offering at the trial of this case?

Mr. Davidson: Not at this time.

Mr. Melson: Do you anticipate developing or addressing any other opinions as respects the Knox County Sheriff's Department policy violations regarding this case?

Mr. Davidson: Not at this time.

Mr. Melson: It that changes, you will agree to advise us promptly so that we can do a supplemental deposition, I take it?

Mr. Davidson: Sure.

Mr. Melson: Now, you've told us apart from the issue of what existing policies were violated, that you believe that the Sheriff's Department should have had a policy that was not in existence in January 1999, specifically that of dealing with handling mentally disturbed persons, is that true?

Mr. Davidson: Yes.

Mr. Melson: And you described what you believe such a policy should address already, correct?

Mr. Davidson: Yes.

Mr. Melson: Do you believe that there were any other policies that the Knox County Sheriff's Department should have had in place in January of 1999, but did not, other than the policy or a policy that specifically addressed the handing of mentally disturbed individuals?

Mr. Davidson: Well, that's an open-ended question. All I've been asked to do here is determine whether lack of a policy in this particular incidence exhibited a deliberate indifference on their part, and I think it did. I don't know of other policies they may or may not have regarding other areas.

* * * *

Mr. Melson: Now, you told us today here in some general terms that you believed that Knox County Sheriff's Department should have had a policy regarding the handling of mentally disturbed persons, who are being incarcerated in the detention facility. Is that what you've told us?

Mr. Davidson: Well, I don't – I'm talk – yeah, in so many words. What I'm talking about is having a policy that directs sheriff deputies on how they are to handle mentally disturbed persons they encounter.

Mr. Melson: And what should that policy say?

Mr. Davidson: Well, I've already been over this once before and testified about this earlier. And whatever that testimony is, I can't remember word for word, I stand by it.

Mr. Melson: I never heard you tell me anything specifically about what you thought the policy should say.

Mr. Davidson: Well, as I testified earlier, it should tell the officer, one, it should give them guidelines of what they should recognize. I think I testified to that. Secondly, it should tell officers how they are to approach these people and what they are to do when they approach them, give them guidelines as to how to act. And, thirdly, it should tell them where these people are to be taken and dealt with. Now, the whole specifics of the policy and how the Knox County Sheriff's Department will dictate those particular things, that should be up to the Sheriff. But it's got to give the officers some guideline

how to deal with these people. For instance, here, and I can only use Nashville as an example, they have specific guidelines of what officers are to do. And what this does, it protects the officers, it protects the other person, too. It's not left to their judgment with how to deal with mentally disturbed people. They are basically told what they are to do. And, you know, here some of them they are taken to a place called Father Strobel's, others they are taken to Meharry. And then, you know, they have guidelines, I know for a fact in the metropolitan jail here as to what happens when a person is mentally disturbed what they're supposed to do. So I'm saying the Knox County Sheriff's Department after all this time, and we certainly in the law enforcement community, they now people are mentally disturbed and deal with it all the time, they should have some policy that tells the officers how to respond to these people and what they're supposed to do, not just treat them like every other person who is brought in there for a DUI.

Mr. Melson: Now, on what authority do you base that opinion?

Mr. Davidson: I'm not sure what you mean by authority.

Mr. Melson: Well, what particular book or treatise or case, for that matter, underguards your opinion that that is something the Knox County Sheriff's Department should have done?

Mr. Davidson: Well, first of all, I consider the Knox County Sheriff's Department a law enforcement agency. I know they're a sheriff's department, but they're also a law enforcement agency. And I think that comes from years of experience. If you look at the IACP training keys, the legal bulletins of the F.B.I., that's certainly taught. There is an organization in Tennessee called the Tennessee Municipal Technical Advisory Service, which publishes a standard manual, a proposed manual for law enforcement agencies, how to deal with different problems. I'm not sure that's part of it or not, but I believe it is. It doesn't tell them exactly how to develop their own policy, there's certain things that you must develop a policy. And plus I've taught this myself at the graduate level at Middle Tennessee State, you know, taught police departments that, you know, you've got to have specific policies. I mean, we had a whole section on policies that a department must develop, and dealing with the mentally ill, is just one of the may areas that departments have got to develop polices and give officers guidelines.

Mr. Melson: Can you point me to a particular book or treatise or case that supports your particular view that there should be a policy with respect to mentally disturbed persons for a county detention facility?

Mr. Davidson: Well, I think what you are wanting me to say, and I'm not prepared to say this, that a county detention facility have a policy. I'm saying the Knox County Sheriff's Department should have a policy that tells officers how they are to deal with mentally disturbed people. Now, you can take that and put it in a detention facility environment or you can put it on the street or in a rural county road. I'm saying that an officer of the Knox County Sheriff's Department should have a policy that tells him how to deal with mentally disturbed people. A lack of that leaves that up to the judgment of the officer and does not protect the citizens, which the policy is designed to do.

* * * *

Mr. Davidson: If I am asked to I will. I mean, I think I can testify as to what I've taught my officers over many years about how to deal with these people. Now, the thing I need to try to emphasize is that I'm not the Knox County Sheriff. He needs to develop the policies that he

feels is necessary for his department. For instance, if you look across this state, every department has different policies to deal with different things. For instance, the hostage negotiation policy here in Nashville has been used before by the F.B.I. Academy as an example for the country, but its policy is different from the Memphis Police Department's, okay? So I'm not going to say that I can tell the Knox County Sheriff how to deal with his people. He's the ultimate law enforcement authority in that county. That's a decision he's charged with making. I'm simply saying that to have no policy in this day and age when officers deal with these kind of people on a daily basis is simply a situation that no sheriff should allow to happen. It's almost like not having a use of force policy or not having a policy on when do you cut off emergency pursuit cases. You know, these are guidelines. That's a good example. For many years departments didn't have any guidelines on how – when should an officer cut off an emergency pursuit or when should he do it at all, and every department differed. But to have nothing leaves it up to the officers discretion, which can sometimes be fatal.

APPENDIX F

[Excerpts from Affidavit of Phillip L. Davidson, September 18, 2000]

1. Name and Qualifications. My name is Phillip L. Davidson. I list as my qualification, the attached curriculum vitae, Exhibit "A". I also attach a list of cases in which I have given testimony or prepared a Rule 26 statement or affidavit, Exhibit "B".

2. Documents Relied Upon for Opinion. In forming my opinion, I have relied upon my own personal knowledge, training and education, as well as the following documents.

1) Brad Carey file from the major crime unit

2) Inmate Statement

3) Pleadings

4) Depositions of Gregory Roy Stanley

5) Internal Affairs Report

6) Interview of Gregory Stanley

7) Deposition of Gabriel Mullinax

8) Statement of Gabriel Mullinax

9) Internal Affairs report of Gabriel Mullinax

10) Deposition of Cory Johnson

11) Statement of Cory Johnson

12) Internal Affairs interview with Cory Johnson

13) Deposition of Mary Catherine Elliott – Nurse

14) Nurse Elliott's notes

15) Nurse Elliott's statement

16) Deposition of Andy Collins

17) Statement of Andy Collins

18) Internal Affairs interview of Andy Collins

19) Deposition of Emily Anderson – nurse

20) Deposition of William Craig Carey

21) Deposition of Steven Douglas Carey

22) Deposition of Cathy Martin

23) Deposition of Sheriff Tim Hutchison

24) Deposition of Jason Wayne Helton

25) Statement of Jason Wayne Helton

26) Internal Affairs Interview with Jason Wayne Helton

27) Second Internal Affairs interview with Jason Wayne Helton

28) Deposition of Todd Cook

29) Deposition of Robert Spangler

30) Deposition of Dorothy Pingston

31) Deposition of Pete Garza

32) Deposition of Rooney Bivens

33) Deposition of Timothy Crystal

3. Subject Matter of Testimony. I will give an opinion regarding the following:

1) Deputy Jason Wayne Helton's use of force against Brad Carey

2) Whether the Knox County Sheriff's Department had proper administrative procedure in place to recognize and handle mentally disturbed persons who are incarcerated in the Knox County jail.

4. Facts Relied Upon for Opinion.

1) On January 3, 1999, Brad Carey [Carey] was arrested for disorderly conduct and reckless driving by the Knoxville city police.

2) That at this time he was suffering from mental illness, namely bipolar disorder, depression, and manic depressive episodes.

3) That Carey was taken to the Knox County jail.

4) That Carey was taken out of the transport vehicle and placed against a wall where he was patted down. Carey was vocal and agitated at this time.

5) Deputy Jason Helton [Helton] kneed Carey while he was standing against the wall.

6) Carey was given a shower and placed into holding where he started to exhibit bizarre behavior doing jumping jacks, setups, pushups and running circles.

7) Helton tried to enter the holding room. When the door was finally opened, Carey ran screaming from the room.

8) Deputies were able to take Carey to the ground and get him handcuffed and shackled.

9) Carey was taken to a room (6C 101) and place on a bunk. His shackles and handcuffs were removed.

10) The sheriff's deputies were informed that Carey was suffering from mental illness by a call from Carey's mother.

11) It was then determined that Carey needed to be move to what is called the "rubber room."

12) Six deputies came to Carey's room and ordered Casey to get up. When he didn't respond quickly enough, he was jerked up off the bed.

13) He was taken out of the room by six deputies. Halfway across the day room on the way to the rubber room,

Carey begin to resist and started screaming unintelligible things. The officer quickly subdued Casey.

14) While on the floor, Carey was again kneed by Helton. Carey was also sprayed with "freeze p"

15) Carey was dragged into the medical room while Helton had him by the hair.

16) As they entered the medical room, Helton asked if there were any cameras in the room.

17) Carey was placed face first on the floor and was still struggling.

18) At this point, Helton kneed Carey and Carey went limp.

19) After a few seconds, a deputy noticed Carey's ear had turned blue, then his face.

20) At the time of this incident to Knox County Sheriff's Department had no policy which dictated to officers how mentally disturbed persons were to be treated. The Knox County Sheriff's Department classified mentally disabled persons in the same manner as persons suffering from some physical medical problem.

21) The Knox County Sheriff's Department did have a policy regarding use of force.

5. Opinion. In my opinion, the force used by Deputy Helton was excessive. Further, the Knox County Sheriff's Department exhibited a deliberate indifference to the welfare

and safety of inmates who suffered from mental illness and were placed in its care, custody and control.

6. Grounds for Opinion. Carey was mentally disturbed individual who was arrested on misdemeanor charges. He exhibited aberrant behavior as soon as he arrived at the jail, intermittently talking with deputies then struggling with them. His behavior should have placed the deputies on notice that he may have been suffering from some mental illness. But even if the deputies had taken notice that he was exhibiting aberrant behavior, they did not have any administrative guidelines to outline their coarse of conduct in regards to how they should have treated Carey.

During each incident that Mr. Carey exhibited resistance, there was a sufficient number of deputies present to restrain him without any use of force whatsoever. The Knox County sheriff's department's use of force policy sets forth guidelines which tell officers how much force to use in given situations. It sets forth a progression of force that officers are required to follow. Deputy Helton's use of force violated the department guidelines because the record shows that Carey was not putting anyone in any danger and did not offer sufficient resistance to warrant any striking of his body under any circumstances. Use of force against mentally, or persons usually results in that person reacting violently. However, the record shows that there were at the time six deputies and at all times they had control of Carey. Any use of force such as "knee strikes" under this condition violated the Knox County Sheriff's Department Policy and constituted excessive force. Knee strikes to the head and upper chest also violate acceptable standards of training in the area of use of force. The Knox County sheriff's department's "policy" regarding handling mentally disturbed people is the same as if they were injured in an auto accident, which in effect is no policy at all.

Guidelines should be developed to tell officers how to deal with persons exhibiting aberrant behavior such as Mr. Carey. In Mr. Carey's case, the deputies were left to the own judgment in their response to Carey. The Knox County Sheriff's Department was aware that mentally disturbed persons act differently and require different responses than normal prisoners. Yet knowing this, they failed to promulgate a policy to take into consideration these special persons. This lack of a policy showed a deliberate indifference to persons such as Mr. Carey who suffered from mental illnesses and their rights.

/s/ Phillip L. Davidson
Phillip L. Davidson

[Notary information omitted.]

[Excerpts from Exhibit A to Affidavit of Phillip L. Davidson, September 18, 2000]

FORMER POSITIONS: Director, Law Enforcement Training Academy
3025 Lebanon Road, Nashville, Tennessee 37214
Executive Secretary, Peace Officers Standards and Training Commission of Tennessee appointed by Governor Alexander, 1985-1987
Sergeant, Metropolitan Police Training Academy, 1973-1982, Nashville, Tennessee
Chief Hostage Negotiator
SWAT Team Member
Director, Spouse's Program
Director, Wills Program

Member, Grievance Committee
Member, Awards Committee

Professor, Belmont College, Nashville, Tennessee 1977-1985
Taught: Terrorism, Criminal and Constitutional Law, General Psychology and Business Industrial Psychology and Penology, Police and Community, Police Administration

Professor, Tennessee state University, 1977-1983
Taught: Patrol Administration, Police Administration(Graduate Level), Traffic Investigation, Organizational Management for Police

Professor, Cumberland University, 1984-1986
Taught: Terrorism, Introduction to Criminal Justice, Criminal and Constitutional Law

EDUCATION:

General Education–West High School, Nashville, Tennessee, 1965

BS History, Police Science, Education, Aviation
Middle Tennessee State University, 1969

MA Clinical Psychology
Middle Tennessee State University, 1976

* * * *

MCJ Criminal Justice
Tennessee State University, Middle Tennessee State University, 1978

JD Law, Nashville School of Law, 1978

PhD Higher Education Administration
Vanderbilt University, 1981

SPECIAL SCHOOL: United States Army: Infantry Officers Course, Airborne Advisor's School, Armor Officer Advanced Course, Command and General Staff College

FBI: Hostage Negotiators School, 1978

Northwestern University: Psychological Stress School, Hostage Negotiator School, Police Civil Liability School, Officer Survival School, 1973-1978

* * * *

OTHER ACHIEVEMENTS: Published Counter-Terrorism book, entitled SWAT, by Charles C. Thomas

Helped initiate and found the Awards Program for the Metro Police Department

Founded Spouse's Class for Police families, the first in the South for Police

Founded and trained the SWAT Team for the Nashville Police Department

Drafted the Hostage Policy and Master Patrol Policy for the Police Department

Drafted the Title 9 Affirmative Action Program for the Nashville Police Department

Served on the Governor's Child Sexual Abuse Task Force

Contributing Editor, Encyclopedia of Police Science

MILITARY EXPERIENCE: Served as an Infantry Officer (2LT-CPT) in Berlin, Germany, South Vietnam and Alaska, 1969-1973

Armor Company Commander, C-3-109 AR BN, 1976-1978

	LTC, Tennessee National Guard, Commanding Officer, 3-109 AR BN, 1989-1993
	Colonel, Deputy for Plans, Operations and Training for the State of Tennessee, 1996 (retired 1999)
LAW PRACTICE:	Specialized in Personal Injury, Civil Rights and Criminal Law
EXPERT TESTIMONY:	Qualified as an expert in both State and Federal Courts in the areas of police stress, use of force, police administrative procedures, police tactical responses, police training

APPENDIX G

[Excerpt from the Affidavit of Phillip L. Davidson, March 16, 2001]

AFFIDAVIT OF PHILLIP L. DAVIDSON, Ph.D., J.D.

After being duly sworn, Phillip L. Davidson states:

1. I am Phillip Davidson. I am an adult resident of Tennessee and am an expert witness for the Plaintiff in the case of *Carey v. Helton, et al.* My qualifications have been spelled out in detail in my previous affidavit, a true and correct copy of which is attached as Exhibit 3 to my deposition testimony in this case.

2. I have personal knowledge of the opinions set forth in this affidavit. I have applied the education, training, experience and other knowledge described in my deposition in reaching the conclusions stated in this affidavit.

3. I have reviewed the Affidavit of Pete Garza and its attachments. The affidavit was made on February 14, 2001, which was after my deposition was given on October 20, 2000. In response to the Garza affidavit, I make this amplification or particularization of my own opinions, which were stated in my Rule 26(a) disclosure and in my deposition.

4. The documents attached to the Garza affidavit do not constitute a "policy" that guides officers and deputies of the Knox County Sheriff's Department.

a. The first attachment to the Garza affidavit represents a medical policy. This policy does not contain any guidance, guidelines, or standards to which deputies or non-medical personnel can conform their behavior when dealing with mentally ill or emotionally disturbed persons. If the Knox County Sheriff's Department relies upon Chapter 9.1 of the Policy and Procedures Manual as a policy covering the interaction of its non-health trained personnel with mentally ill or emotionally disturbed persons, as Sheriff Hutchison indicates it does, then this reliance constitutes deliberate indifference to the rights and safety of mentally ill or emotionally disturbed persons coming into contact with the personnel of the Knox County Sheriff's Department.

b. The second attachment to the Garza affidavit is three sections from the Training Manual for the Knox County Sheriff's Department. The Manual excerpts are: (1) a "Training Schedule" for new personnel in the Corrections Division; (2) a Use of Force Lesson Plan; and (3) an excerpt from an "Instructor's Guide" entitled "Psychological Disorders: Psychopathic and Neurotic Personalities." These documents do not convey enough information to adequately train a new officer about how to manage and deal with mentally ill or emotionally disturbed persons; in fact, the documents contain so little meaningful assistance to a new officer, that to teach from these documents exhibits deliberate indifference to the bodily integrity and safety of those mentally ill or emotionally disturbed persons that come into contact with the Knox County Sheriff's Department. Even if these documents constituted sufficient training material, which they do not, the documents do not represent a policy or guideline of the Knox County Sheriff's Department for handling mentally ill or emotionally disturbed persons.

5. The Knox County Sheriff and his Department obviously recognize that their officers would come into routine contact with mentally ill or emotionally disturbed persons, for even their training material states: "Many inmates are in jail because they have psychopathic or sociopathic personalities – always getting into trouble[.] Instructor's Guide, ¶ I.A.1, p. 343 (third part of second attachment to Garza affidavit). Armed with this knowledge, the Knox County sheriff failed to implement any policies or guidelines for controlling his officers' interactions with or handling of mentally ill or emotionally disturbed persons.

6. Under these circumstances, my opinion bears repeating: the Knox County Sheriff's Department did not have in place necessary administrative guidelines to specify a course of conduct to its officers when interacting with mentally ill or emotionally disturbed persons; the absence of an administrative guidelines left each officer to exercise his or her own judgment freely in their response to mentally ill or emotionally disturbed persons, in general, and Warren Brad Carey, in particular; and, the lack of a policy demonstrated a conscious disregard of a known, substantial, and life-threatening risk, as well as a manifest and deliberate indifference to the constitutional and civil rights of such mentally ill or emotionally disturbed persons, in general, and to the constitutional and civil rights of Warren Brad Carey, in particular.

7. While it may be true that the Knox County Sheriff's Department had a policy of getting mentally ill or emotionally disturbed persons to the medical staff, that assertion belies the fact that the Knox County Sheriff's Department had no policy, guideline, standard, training, or other rule to guide the interaction of its officers with mentally ill or emotionally disturbed persons apart from delivering such persons to

medical staff. The lack of such a policy is not excused by the presence of a medical policy and it causes officers to violate the rights of mentally ill or emotionally disturbed persons by leaving the officers without proper guidance in dealing with such persons.

/s/ Phillip L. Davidson
Phillip L. Davidson

[Notary information omitted.]

APPENDIX H

[Excerpt from the Deposition of Charles W. Harlan, M.D., October 20, 2000]

Dr. Harlan: This is the crux of it. The term "hemorrhage into the plaque" is the English translation of the original French, which is hemorrhage in plaque, which is spelled H-E-M-O-R-R-H-A-G-E dash P-L-A-Q-U-E, which means that there has been bleeding into the atherosclerotic plaque itself. And in this particular case, the first portion of the causes is the one that applies; namely, "increased pressure within the capillaries as in hypertension." In fact, the process of Mr. Carey's being subdued and receiving multiple blunt trauma would have caused his blood pressure to go up. He would have developed a blood pressure probably in the range of 240/180, which would have caused rupture of the capillary and hemorrhage into the plaque, thereby causing the plaque to push over and to occlude, spelled O-C-C-L-U-D-E, or block the coronary artery lumen, the lumen being the hole. This produced the ischemia or the shortage of oxygen to the heart muscle, which caused his problems, which caused him to turn blue, and which caused the changes that are described

microscopically by Dr. Elkins in the autopsy report as to the alterations in the muscle, and the inflammatory cell response in the heart that she sees on the microscopic slide.

Mr. Melson: So if I am understanding you correctly, and again from purely a layman's perspective, you conclusion is that Mr. Carey's death resulted from what causative factor or factors?

Dr. Harlan: Mr. Carey had a preexisting medical condition; namely, the arteriosclerosis.

Mr. Melson: Which in lay terms is what?

Dr. Harlan: He has hardening of the arteries.

Mr. Melson: Go ahead.

Dr. Harlan: In the process of being subdued, the multiple blows, et cetera, that he received, caused his blood pressure to go up. He developed at least transient hypertension, which caused at least one of the capillaries or small blood vessels running through the plaque to rupture causing acute hemorrhage, bleeding, into the plaque, and the plaque swelled because of this accumulation of blood, and the swollen plaque blocked the lumen or the hole through which blood runs in the center of the artery such that

blood did not flow to the heart muscle that it needed to and it caused the heart muscle to have a shortage of oxygen and to become ischemic; that is, to show changes consistent with loss of oxygen, and caused the initial phases of a heart attack, and that this heart attack in and of itself is the immediate cause of his death.

Mr. Melson: But you believe the heart attack was precipitated by a chain of causative factors that had their origin in the application of certain instances of multiple blows being received on Mr. Carey's body by one or more of the corrections officers?

Dr. Harlan: Correct, causing further injury to an already damaged artery.

Mr. Melson: How many blows did Mr. Carey receive and at what point and from what person according to your understanding of the records in this case?

Dr. Harlan: He received multiple blows.

Mr. Melson: What does that mean?

Dr. Harlan: Multiple –

Mr. Melson: Multiple means more than one. How may did he receive?

Dr. Harlan: I don't know for sure.

Mr. Melson: Could it have been as little as three, as little as two?

Dr. Harlan: Multiple meaning anywhere from three to a thousand.

Mr. Melson: You can't narrow it down for this jury in this case any better than that?

Dr. Harlan: There are videos, which are available, that show exactly what happened.

Mr. Melson: And you have reviewed them and what did they show you?

Dr. Harlan: And I've reviewed them and there are bodies between me and his body and I can't tell you exactly, and I didn't try to enumerate them. That was not my goal. My goal was to understand the pathologic entity that produced his death.

Mr. Melson: Could his death have occurred as a result of causes apart form and unrelated to his receipt of these multiple blows that you've described?

Dr. Harlan: That question is not exactly correct. His death occurred as a result of the arteriosclerosis and the hypertension caused by the blows.

Mr. Melson: Could the hypertension have been caused by some cause other than the

blows, which could have, therefore, triggered the artherosclerotic complications, the cardiac arrest and the death?

Dr. Harlan: Had there been another cause of hypertension there, yes, sir, but there is no other cause of the agent at the time, and we know that he turned blue in the process of receiving the blows, and that's the time when the blood pressure was high enough to cause damage to the capillaries, which caused the hemorrhage into the plaque, which caused the narrowing and occlusion of the coronary artery, which caused his death.

Mr. Melson: Can hypertension be caused by someone who is excited or in an agitated state?

Dr. Harlan: Yes.

Mr. Melson: Can hypertension be cause by someone, who is in a manic state?

Dr. Harlan: They are not directly related, no. There needs to be some stimulus to activate that.

Mr. Melson: Suppose someone, who suffers from bipolar disorder such as Mr. Carey, enters a manic phase of behavior from whatever cause or causes, can that

trigger an elevation in his blood pressure?

Dr. Harlan: Not to sufficient level to cause a capillary eruption, no, sir.

Mr. Melson: On what do you base that?

Dr. Harlan: On the basis of 30 years experience doing autopsies.

Mr. Melson: I'm not talking about a dead body. I'm talking about somebody in a manic episode. Have you ever taken the blood pressure –

Dr. Harlan: I'm talking about reviewing the charts of people who die, and that's part of forensic pathology.

Mr. Melson: I want to ask you if you have ever undertaken in your medical career to review any studies regarding the relationship between persons, who suffer from manic episodes, and that relation to incidences of hypertension possessed within such persons during manic phases of behavior?

Dr. Harlan: No, sir, no formal study. That's in the course of my experience has been as a forensic pathologist.

Mr. Melson: So your opinion is that the only thing that could have stimulated this alleged

elevation in the blood pressure possessed by Mr. Carey was his receipt of blows by these police officers or officer?

Dr. Harlan: That's correct. There's no other cause that I know of, that occurred at that time.

Mr. Melson: And we have looked at and marked as Exhibit 4 all medical records, which you have reviewed in this case, have we not, Doctor, or are there medical records apart from those contained with Collective Exhibit 4, which you have reviewed but did not consider particularly germane or relevant to your opinions?

Dr. Harlan: Those are the medical records, which I considered to be germane to my opinion. Not everything in those records is germane.

APPENDIX I

[Excerpt from the Deposition of Sheriff Timothy Ray Hutchinson, June 22, 2000]

Ms. Stapleton: [I]s there [a policy] specifically for emotionally disturbed individuals?

Sheriff Hutchinson: That is a medical problem, and it falls in medical -- in the medical problem policy.

Ms. Stapleton: Okay. So emotionally disturbed individuals are referenced within the medical policy; is that what you're saying?

Sheriff Hutchinson: Yes. It would fall under a medical problem.

APPENDIX J

[Excerpt from the Deposition of Rodney Paul Bivens, Commander of the Knox County Detention Facility, September 11, 2000]

Ms. Stapleton: [] So with reference to emotionally disturbed individuals, what would the policy be for handling those individuals from an intake or a nonmedical standpoint?

Mr. Bivens: Okay. In the intake area, if an inmate comes in and he's plainly showing signs of mental illness, you know, and that would be talking to himself or, you know, something just really off the wall that don't make sense at all, then they would notify medical as soon as possible and try to get that person to medical or to the special needs housing pod.

Ms. Stapleton: Okay. So it's really the nonmedical employees' job to contact medical?

Mr. Bivens: Right.

Ms. Stapleton: Anything else?

Mr. Bivens: As far as the --

Ms. Stapleton: As far as what they are supposed to do when they encounter somebody who is obviously emotionally disturbed?

Mr. Bivens: No. Medical will take it from there and then they'll do the evaluation and stuff and call Mobile Crisis or whoever they need to from that point.

APPENDIX K

[Excerpt from Training Schedule for New Officers]

KNOX COUNTY SHERIFF'S DEPARTMENT

CORRECTIONS DIVISION

TRAINING SCHEDULE

WEEK 1 -
ORIENTATION -

COMPLETE PAPERWORK

INTRODUCTION TO ADMINISTRATIVE STAFF

MISSION STATEMENT

RULES OF CONDUCT
- A. DRESS CODE
- B. RANK STRUCTURE
- C. DUTY HOURS

DEALING WITH TODAY'S INMATE (VIDEO)

POLICY AND PROCEDURES
- A. INMATE HANDBOOK
- B. DISCIPLINARY POLICY

CORRECTION OFFICER SURVIVAL (PART 1 & 2) (VIDEO)

POLICY AND PROCEDURES
- C. EMERGENCY PROCEDURES
- D. SEARCHING/HANDCUFFING
- E. ESCORTING/TRANSPORTING

INTRODUCTION TO REPORTS/REPORT WRITING

GAMES INMATES PLAY (VIDEO)

LEGAL ISSUES

USE OF FORCE

<u>WEEK 2 -</u>
BASIC JAIL TRAINING

<u>WEEK 3 -</u>
EXTENSIVE TRAINING -

INMATE MANAGEMENT AND CONTROL
- A. CLASSIFICATION
- B. SPECIAL CUSTODY INMATES (VIDEO)

INMATE CONTROL
- A. HEAD COUNTS
- B. CONTRABAND (VIDEO)
- C. INMATE SEARCHES
- D. USE OF FORCE
  1. CONFRONTATIONS
  2. SECURITY DEVICES
  3. USE OF RESTRAINTS
  4. USE OF ADMINISTRATIVE LOCKDOWN
- E. INMATE MOVEMENT

ATTITUDES, RELATIONSHIPS, COURTESY AND APPEARANCE

A. ATTITUDE
   1. TOWARDS JOB
   2. TOWARDS LEARNING
   3. TOWARDS ACCEPTING CRITICISM/PRAISE

B. RELATIONSHIPS
   1. WITH OTHER OFFICERS
   2. WITH OTHER STAFF
   3. WITH SUPERVISORS
   4. WITH INMATES
   5. WITH ETHNIC AND RELIGIOUS GROUPS OTHER THAN OWN
   6. WITH SEXUAL PREFERENCES OTHER THAN OWN

C. COURTESY
   1. TOWARDS OTHER OFFICERS
   2. TOWARDS OTHER STAFF
   3. TOWARDS SUPERVISORS

D. APPEARANCE
   1. BASIC PHYSICAL FITNESS
   2. UNIFORM

SAFETY PROCEDURES AND MAINTENANCE OF EQUIPMENT

A. WEAPON SECURITY

B. SECURITY CHECKS AND CELL CHECKS (VIDEO)
   1. KEY CONTROL
   2. SECURITY DOOR CHECKS
   3. CELL CHECKS
   4. INSPECTIONS

C. RADIOS
   1. CODES
   2. METHODS OF USE

WEEK 4 -
INTERPERSONAL COMMUNICATIONS TRAINING

WEEK 5 -
ON THE JOB TRAINING-

OFFICER SAFETY/INMATE MANAGEMENT AND CONTROL/KEY CONTROL/RADIO/REPORTS/ATTITUDES, RELATIONSHIPS

WEEK 6 -
ON THE JOB TRAINING -

SECURITY CHECKS/SPECIAL CUSTODY INMATES/ INMATE COUNTS/CELL INSPECTION

WEEK 7 -
ON THE JOB TRAINING -

INMATE SEARCH - FRISK - STRIP/JAIL CLOTHING ISSUE - RETURN - STORAGE

WEEK 8 -
ON THE JOB TRAINING -

INFIRMARY/SICK CALL/TIME MANAGEMENT

WEEK 9 -
ON THE JOB TRAINING -

VISITATION/PROPERTY RECEIPT/GENERAL PUBLIC/PROPERTY SEARCH/ DISTRIBUTION OF PACKAGES

WEEK 10 -
ON THE JOB TRAINING -

KEY CONTROL/SECURITY/WEAPONS
SAFETY/INMATE MOVEMENT/
MAINTENANCE OF EQUIPMENT

WEEK 11 -
SUPERVISOR EVALUATION - GRADUATION

(2)

No. 03-770

Supreme Court, U.S.
FILED
JAN 30 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NORMA CAREY,

Petitioner,

v.

KNOX COUNTY, TENNESSEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS KNOX COUNTY, TENNESSEE; TIMOTHY HUTCHISON, SHERIFF OF KNOX COUNTY, TENNESSEE, IN HIS OFFICIAL CAPACITY; AND OFFICER JASON HELTON IN HIS OFFICIAL CAPACITY

MARY ANN ROSS STACKHOUSE
Deputy Law Director
OFFICE OF THE KNOX COUNTY
LAW DIRECTOR
400 Main Avenue, Suite 612
Knoxville, TN 37902
(865) 215-2327

Counsel for Respondents Knox County, Tennessee; Timothy Hutchison, Sheriff of Knox County, Tennessee, in his official capacity; and Officer Jason Helton in his official capacity

185455

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether the Petitioner has stated compelling reasons for granting certiorari where the Sixth Circuit's decision is harmonious with the relevant decisions of this Honorable Court, namely, *City of Canton v. Harris*, 489 U.S. 378 (1989), *Board of Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 435 (1997) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

II. Whether the Petitioner has stated compelling reasons for granting certiorari where the Sixth Circuit's decision is not in conflict with the decisions of other United States Courts of Appeals and is harmonious with its own precedent on the same important matter.

III. Whether Petitioner has identified an important question of federal law that needs to be settled by this Honorable Court.

PARTIES TO THE PROCEEDINGS

Petitioner

Petitioner correctly describes herself at page ii of her petition.

Respondents

Petitioner correctly describes Knox County, Tennessee. Sheriff Timothy Hutchison's name is spelled Hutchison. If Jason Helton is a party to this action, he is a party respondent only in his official capacity. Mr. Helton is not a party respondent in his individual capacity inasmuch as petitioner, in her capacity as plaintiff in the District Court, dismissed her claims against Officer Helton.

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TABLE OF CITED AUTHORITIES

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Cases:

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City of Canton v. Harris, 489 U.S. 378 (1989) ... *passim*

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U.S. Sup. Ct. R. 10 10

Respondent opposes the petition for a Writ of Certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case and respectfully requests that the petition be denied.

STATEMENT OF THE CASE

This case arises out of the death of Warren Brad Carey on January 3-4, 1999. Norma Carey filed a civil rights lawsuit under 42 U.S.C. § 1983 alleging that the death of Warren Brad Carey, her son, occurred under color of state law, because of the actions of Corrections Officer Jason Helton in his individual and official capacity, and as a direct and proximate result of Knox County's and Sheriff Hutchison's defective policy, lack of policy, and/or inadequate training of correctional officers regarding mentally ill inmates.

Norma Carey filed her lawsuit in the United States District Court for the Eastern District of Tennessee on October 21, 1999, against Knox County, Tennessee, Sheriff Tim Hutchison in his official capacity, and correctional officer Jason Helton in his individual and official capacity (hereinafter, "Knox County").[1]

On motion for summary judgment, Knox County argued that no training or lack of training or Knox County policy or a lack of policy caused any deprivation of the civil rights of Warren Brad Carey or proximately caused the death of Warren Brad Carey.

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1. Suing a public official in his official capacity for acts performed within the scope of his authority is equivalent to suing the governmental entity itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985).

The District Court granted Knox County's motion for summary judgment, dismissed all individual claims asserted by Norma Carey and all federal claims against Knox County and declined to exercise supplemental jurisdiction over Plaintiff's state law claims. The District Court dismissed the § 1983 claim against Knox County, Tennessee, holding that

> In any event, the Court need not conclude there is no genuine issue of material fact as to whether the training program was adequate, for Plaintiff has not presented sufficient evidence to create an issue as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates. Knox County's internal investigation of Decedent's death criticized Defendant Helton's use of force as a violation of Department policy. Unlike the situation in *Russo*, however, the report did not otherwise fault the Jail staff's handling of Decedent. Moreover, again unlike *Russo*, there is evidence Knox County maintained procedures for handling mentally ill inmates and conducted at least rudimentary training for its correctional officers on these procedures. The Court does not doubt the training could be improved. But this is not the test. What is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*. The unfortunate reality is that even additional or better training might not have prevented Defendant Helton's allegedly unconstitutional conduct.

> At the same time, Plaintiff has presented no evidence suggesting Knox County should have known Defendant Helton was prone to using excessive force or treating mentally ill inmates poorly. Indeed, unlike *Leach*, there is no evidence Knox County had notice of a pattern of mistreatment of mentally ill inmates by any correctional officers at the Jail. On the contrary, Plaintiff alleges only mistreatment by Defendant Helton. Under the holdings of *Harris* and *Sargi*, such circumstances will not support a finding that Knox County's training was deliberately indifferent to the constitutional rights of inmates and constituted an official policy. Accordingly, the court will GRANT Defendant Knox County's motion for summary judgment as to Plaintiff's § 1983 cause of action.

[Petitioner's Appendix D at 29a-30a].

Following the entry of the District Court Order, Norma Carey voluntarily dismissed her claims against Officer Helton in his individual capacity and filed a timely appeal to the United States Court of Appeals for the Sixth Circuit.

THE SIXTH CIRCUIT'S OPINION

The Sixth Circuit affirmed the judgment of the District Court, per curiam. The Sixth Circuit concluded "without hesitation"

> that the district court was legally correct in granting summary judgment to the defendants on Norma Carey's claims against the county and the other two defendants in their official capacities

> because plaintiff offered no significant probative evidence that the county maintained an affirmative policy regarding the handling of mentally ill detainees that led to the use of excessive force against the decedent. Moreover, despite the fact that the plaintiff's failure to train claim presents a closer question, we agree with the district court's holding that the record fails to establish an issue of fact as to whether the county was liable under the standard set out in *City of Canton v. Harris*, 489 U.S. 378 (1989).

[Petitioner's Appendix B at 6a-7a]. The Sixth Circuit explained the law on municipality liability and failure to train claims thusly:

> Because a plaintiff cannot rely on *respondeat superior* to hold a municipality liable under § 1983, *see Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), she must show that the municipality's policy (or lack thereof) was a "moving force" in the deprivation of the plaintiff's rights. *See Doe v. Claiborne County*, Tennessee, 103 F.3d 495, 508 (6th Cir. 1996). Likewise, to prevail on a failure-to train claim under § 1983, the plaintiff must prove: "that a training program is inadequate to the tasks that the officers must perform; that the inadequacy is the result of the city' deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989). Liability cannot be imposed unless "the need for more or different training is so obvious, and the

> inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the [governmental body] can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. 378, 390.

[Petitioner's Appendix B at 7a]. In commenting on the evidence presented on the adequacy of training, the Sixth Circuit stated:

> On the question of adequacy of training, the defendants presented the testimony that Knox County followed the guidelines of the Tennessee Corrections Institute dealing with special needs inmates, which included treatment of emotionally or psychologically disturbed persons. The defendants also produced an instructor's guide describing various psychological disorders that officers are likely to encounter in inmates and guidelines for handling mentally ill inmates. Norma Carey did not provide any evidence that directly refuted testimony that these instruction materials were in fact used. Although Officer Helton testified that he did not remember any training specifically regarding mentally ill detainees, such testimony, standing alone, has been held insufficient to defeat summary judgment. *See Russo v. City of Cincinnati*, 953 F.2d 1036, 1049 (6th Cir. 1992) (Willford, J., concurring); *see also Sova v. City of Mt. Pleasant*, 142 F.3d 898, 904 (6th Cir. 1998) (upholding grant of summary judgment for defendants on failure-to-train claim where "[t]he record shows that all the officers had received extensive training" and

> noting that "[a]llegations that a particular officer was improperly trained are insufficient to prove liability"); *City of Canton*, 489 U.S. at 390-91 ("That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted form factors other than a faulty training program.").

[Petitioner' Appendix B at 7a-8a]. Finally, the Sixth Circuit concluded:

> Even if we were to find that the plaintiff had created a genuine issue of material fact as to the adequacy of the County's training, the district court correctly concluded that the plaintiff failed to produce sufficient evidence to create an issue "as to whether Knox County could be deemed to be callous and indifferent to the need for training on the handling of mentally ill inmates." The district court rested its conclusion in part on the fact that no evidence had been presented regarding a pattern of similar violations in the past by the department, nor any evidence that Helton was prone to using excessive force against mentally ill inmates or inmates in general. As to the third factor, the district court did not directly address the issue of causation. But neither did the plaintiff, although she asserts on appeal that inadequate training regarding mentally ill inmates caused Helton's use of excessive force against Carey, she has not spelled out in the district court or in her brief before this court her theory regarding a crucial question in the causation chain:

> "Would the injury have been avoided had the employee been trained under a program that was not deficient in the identified respect?" *City of Canton*, 489 U.S. at 391. This deficiency alone would establish a sufficient basis for the entry of summary judgment in favor of the defendants.

[Petitioner' Appendix B at 8a-9a].

STATEMENT OF THE FACTS

The Sixth Circuit summarized the facts as follows: Brad Carey had been arrested for reckless driving and disorderly conduct when he came in contact with Officer Helton during the intake process at the Knox County jail. Unbeknown to the Knoxville officers, Carey was psychotic at the time, suffering through a manic period, and at the jail he became highly uncooperative and self-destructive, banging his head against a plexi-glass wall. To subdue Carey, Helton admittedly delivered a series of knee strikes—Helton says he aimed the blows at Carey's legs in an attempt to bring him down, but the plaintiff alleges that the blows landed on the upper part of Carey's body. After Carey was put in his cell, the jail officials received a call from his mother, explaining that her son was mentally ill and had been off his medication for a matter of weeks. As a result, the officer on duty directed the jail staff to move Carey to the medical unit for observation an devaluation. Carey, predictably, resisted and again had to be subdued. [Petitioner's Appendix B at 5a].

Once in the medical unit, Carey was in such obvious physical distress that an emergency call was issued to transport Carey to the hospital. When the emergency medical personnel arrived, Carey was unconscious, had no pulse and had no discernible heartbeat. He was pronounced dead the following day, from a heart attack. [Petitioner's Appendix B at 5a].

The medical examiner concluded that Carey had died of natural causes associated with atherosclerotic heart disease, commonly referred to as hardening of the arteries. The autopsy report also noted the presence of various injuries, contusions, and abrasions to the decedent's chest, head, and face. [Petitioner's Appendix B at 5a-6a].

The plaintiff offered the testimony of a former state medical examiner, who speculated, based on the autopsy report, that Brad Carey's death was actually caused by the blows that he received while struggling with the officers, which "caused his blood pressure to go up," in turn causing . . . transient hypertension, which caused at least one of the capillaries or small blood vessels running through the plaque to rupture causing acute hemorrhage, bleeding, into the plaque, and the plaque swelled because of this accumulation of blood, and the swollen plaque blocked the lumen or the hold through which blood runs in the center of the artery such that blood did not flow to the heart muscle that it needed to and it caused the heart muscle to have a shortage of oxygen and to become ischemic; that is, to show changed consistent with loss of oxygen, and the caused the initial phases of a heart attack, and that this heart attack in and of itself is the immediate cause of his death. [Petitioner's Appendix B at 6a].

Although this medical examiner opined that Brad Carey's heart attack was ultimately the result of "blunt trauma,"[2] it is not clear from the record how he was able to distinguish between Carey's self-inflicted injuries, those necessarily suffered as he resisted the actions of the officers, and those alleged to have been the product of excessive force. [Petitioner's Appendix B at 6a].

Finally, although an expert witness for the plaintiff testified that the training materials were inadequate, this testimony was too conclusory to defeat summary judgment. [Petitioner's Appendix B at 8a].

REASONS FOR DENYING THE PETITION

I. The Petitioner has not stated compelling reasons for granting certiorari where the Sixth Circuit's decision is harmonious with the relevant decisions of this Honorable Court, namely, *City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of Comm'rs of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 435 (1997); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).

The Sixth Circuit correctly affirmed the summary judgment in Knox County's favor consistent with this Court's previous decisions under 42 U.S.C. § 1983 regarding claims of inadequate training. *City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of Comm'rs of Bryan County, Oklahoma*

2. This medical examiner hypothesized, "In my opinion, the blunt trauma does not directly produce Mr. Carey's death. What it does is it causes his blood pressure to go up, and then the two things, the high blood pressure caused by the trauma and the arteriosclerosis in conjunction causes death." This medical examiner acknowledged that hypertension can be caused by someone being excited or in an agitated state.

v. Brown, 520 U.S. 397 (1997); and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).[3] The Sixth Circuit did not contravene this Court's precedent. Rather, the Sixth Circuit properly stated the rule of law.[4]

In *City of Canton*, this Court stated that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 387 (1989). In *City of Canton*, this Court held that "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 489 U.S. at 388. "That a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have

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3. Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). As this Court has stated, "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

4. Petitioner attempts to challenge factual findings and the application of a properly stated rule of law. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law. Sup. Ct. R. 10. The Sixth Circuit correctly stated the proper rule of law regarding claims of inadequate training under 42 U.S.C. § 1983. Even if the Sixth Circuit misapplied the law, certiorari is not favored on those grounds. It cannot be said that the Sixth Circuit's factual findings are erroneous.

resulted from factors other than a faulty training program." *City of Canton*, 489 U.S. at 390-91. As this Court said further about liability:

> Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

City of Canton, 489 U.S. at 391. In *City of Canton*, this Court said further that the identified deficiency in the training program must be closely related to the ultimate injury, which means that the plaintiff "must still prove that the deficiency in training **actually caused** the police officers' indifference to her medical needs." *City of Canton*, 489 U.S. at 391.

In *City of Canton v. Harris*, 489 U.S. 378 (1989), this Court examined several issues. One issue is whether the training program is adequate in light of the duties the officer would reasonably be expected to perform. *City of Canton*, at 390. A second issue concerned whether "the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the . . . [sheriff's department] can reasonably be said to have been deliberately indifferent to the need." *Id.*

It is not sufficient, however, for the Plaintiff to show only that an injury could have been avoided if an officer had better training, but that something more is required before a court may "condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal." *Id.* at 391.[5] Finally, the Plaintiff must also demonstrate that the deficiency in training **actually caused** the officer's indifference to the medical condition. *Id.* In this regard, this Court observed that

> [p]redicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact finder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances.

Id.[6]

Under *City of Canton v. Harris*, 489 U.S. 378 (1989) "inadequacy of police training may serve as the basis for § 1983 liability **only where** the failure to train amounts to

5. "It may be, for example, that an otherwise sound program has occasionally been negligently administered." *Canton*, 489 U.S. at 391, 109 S. Ct. at 1206. Negligence does not give rise to a civil rights violation under § 1983.

6. To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city 'could have done' to prevent the unfortunate incident.

Canton, 489 U.S. at 392, 109 S. Ct. at 1206.

deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 387 (emphasis added). Inaction in the face of **often repeated** violations can be said to be deliberate indifference. *City of Canton*, 489 U.S. at 390 n.10 One incident is not proof of either inadequate training or deliberate indifference. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 820 (1985).

Deliberate indifference is a stringent standard, requiring proof that the governmental entity disregarded a known or obvious risk. *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997). As the Supreme Court stated in *Bryan County*,

> If a program does not prevent constitutional violations, municipal decision makers **may eventually** be put on notice that a new program is called for. Their continued adherence to an approach they know or should know has failed to prevent tortuous conduct by employees may establish the conscious disregard for the consequences of their action – the "deliberate indifference" – necessary to trigger municipal liability, (emphasis added).

Bryan County, 117 S. Ct. at 1390. A municipality may be held liable for inadequate training of its officers under § 1983 only if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388-89, 109 S. Ct. 1197, 1204-05 (1989).[7]

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7. A county is not automatically liable under § 1983 if one of its employees happened to apply a policy in an unconstitutional manner, for, in that instance, liability would then rest on *respondeat superior*, which is not available under § 1983. *City of Canton*, 489 U.S. at 387, 109 S. Ct. at 1204.

Lack of action[8] or lack of policy is not sufficient to confer liability on a governmental entity under 42 U.S.C. § 1983.[9] Under *City of Canton v. Harris*, 489 U.S. 378, 388-89 (1989) the evidence must show that the need to act is so obvious that the government's "conscious" decision not to act can be

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8. It should be noted that the Knox County Sheriff's Department disciplined Officer Helton for the inappropriate knee strikes. It cannot be said that the Department took no action. After the District Court granted summary judgment to Knox County, Petitioner voluntarily dismissed her action against Helton in his individual capacity.

9. Petitioner urges that a cause of action should exist under 42 U.S.C. § 1983 against a governmental entity for a lack of policy and that this is the proper case for such a finding. Petitioner is mistaken because this is not a lack of policy case. As the District Court found, the Knox County Sheriff's Department had a General Policy and Procedure Manual which had a General Medical Services subsection which included procedures concerning the provision of mental health services to inmates. These procedures included screening; observing unusual responses to questions or behavior; housing a stable inmate with mental health problems in the special needs pod with referral to a mental health center for follow up services while incarcerated; housing a combative and uncooperative inmate in the therapeutic isolation room and calling Mobile Crisis to evaluate the inmate for emergency placement at a mental health facility with further follow-up. [Petitioner's Appendix D at 17a-18a]. The District Court found that

> [w]hat is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*.

[Petitioner's Appendix D at 29a].

said to amount to a "policy" of deliberate indifference to [plaintiff's] constitutional rights. *City of Canton*, 489 U.S. at 389. "Deliberate indifference" in this context does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference to the civil rights in question. *Id.*

In opposing Knox County's motion for summary judgment, Petitioner failed to produce more than a scintilla of evidence indicating that Carey's death was actually caused by Knox County's actions and not by Carey's atherosclerotic heart disease. Petitioner also failed to produce more than a scintilla of evidence that Knox County was deliberately indifferent to the need for training or policy on the handling of mentally ill inmates. Petitioner did not produce sufficient evidence to create a material issue of fact as to either causation or deliberate indifference.

Summary judgment cannot be defeated by "the mere existence of a scintilla of evidence in support of the plaintiff's position . . . ; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Under the well-established summary judgment standards of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Sixth Circuit correctly affirmed the summary judgment in Knox County's favor.

II. The Petitioner has not stated compelling reasons for granting certiorari where the Sixth Circuit's decision is not in conflict with its own precedent or the decisions of other United States Courts of Appeals on the same important matter.

A. The Sixth Circuit was not compelled by its own precedent to reverse the summary judgment in the instant case.

Petitioner contends that the Sixth Circuit has violated its own precedent in *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992). In *Russo*, a divided panel reversed the summary judgment of the district court. The facts in *Russo* are distinguishable from the instant case and thus the Sixth Circuit was not compelled by its decision in *Russo* to reverse the summary judgment here.

In *Russo*, a paranoid schizophrenic had "barricaded" himself in his own apartment. After failing to impair him with Taser darts, three officers shot him twenty-two times. He was armed only with a knife. The underlying facts in *Russo* involving the use of deadly force appear to have influenced the Sixth Circuit to reverse the district court's grant of summary judgment for the city. In *Russo*, it appeared that in-service training about mentally ill persons was non-existent. Unlike the instant case, in *Russo*, the plaintiff's expert opinion, though conclusory, was supported by the additional fact that the City of Cincinnati's Office of Municipal Investigation had concluded that "recruit training regarding the mentally ill appear[ed] inadequate, in-service

training . . . [was] virtually non-existent. . . ." *Russo*, 953 F.2d at 1041.[10]

Unlike *Russo*, in the instant case, petitioner offered only a purported expert's conclusory opinion[11] Knox County Internal Affairs made no finding about training. In contrast

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10. In an unpublished opinion in 1997, *Trent v. Hawkins County, Tennessee*, 106 F.3d 402, 1997 WL 35574 (6th Cir. 1997), Judge Nelson commented on *Russo*. In *Trent*, the court upheld the summary judgment for Hawkins County in a civil rights case brought by a mentally ill person who was shot in the leg while being taken into custody by three deputy sheriffs. The issue was training. Ironically, the Plaintiff in *Trent* employed the same expert employed in *Russo*. Judge Nelson observed that Judge Wellford's vote in *Russo* was the deciding one, Judge Suhrheinrich having dissented. Commenting on Judge Wellford's concurring opinion, Judge Nelson stated

> [w]e take it from his concurring opinion that Judge Wellford would have opted to affirm the summary judgment for the defendants if the plaintiffs had been unable to point to anything more than the testimony of . . . [the expert]. **In the case at bar, . . . [the expert's] affidavit is essentially all the plaintiff has.** Here, there is nothing comparable to the report of the Office of Municipal Investigation, for example. Judge Wellford would probably characterize the present case as a close and difficult one too – a characterization with which we would agree – but the logic of Judge Wellford's concurrence in *Russo*, as we read it, points to affirmance of the judgment for the defendants in the case at bar."

1997 WL 35574 at 4-5.

11. Petitioner's training expert does not show that Knox County's training and policy created a known risk or an obvious, highly probable risk.

and in support of its motion for summary judgment, Knox County offered substantial evidence about its training of new recruits by offering the lesson plans and materials provided regarding mentally ill persons; on-going 40 hour in-service training annually; its certification by ACA, and that its training follows the guidelines of TCI. These are facts Petitioner did not dispute or did not dispute successfully in her opposition to summary judgment.[12] Knox County also

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12. Petitioner did not dispute the following: (1) that Knox County Detention Facility's Policy and Procedure Manual is in compliance with the American Correctional Association accreditation standards or that the Detention Facility was accredited by ACA in 1996; (2) that Knox County's training curriculum for new correctional officers is based on the Tennessee Corrections Institute; (3) that with respect to training in the treatment of emotionally disturbed inmates, Knox County follows the guidelines of TCI for special needs inmates; (4) that Knox County has a medical protocol for mentally ill inmates that was developed in cooperation with the detention facility physician and a physician and licensed clinical social worker from Helen Ross McNabb Center; or (5) that a procedure is in place to call Mobile Crisis to come to the facility to evaluate the inmate who displays mental health problems. In an attempt to create an issue of fact, albeit not a material fact, Petitioner argued that the proof is inconclusive that the Helen Ross McNabb professionals spoke to the corrections officers, as opposed to the medical staff, about mentally ill inmates. Administrative choices about who conducts the training does not give rise to a civil rights violation. As Circuit Judge Suhrheinrich reminded the court in his dissent in *Russo v. City of Cincinnati*, 953 F.2d 1036, 1050 (6th Cir. 1992),

> Claims of inadequate training test fundamental considerations of judicial restraint. First, when a federal court reviews municipal or state executive conduct or policy . . . it must be very careful not to violate principles of federalism. Second, the federal judiciary must remain

(Cont'd)

offered substantial evidence about its policy regarding the treatment of mentally ill inmates.[13] The Sixth Circuit was not compelled by *Russo* to reverse the summary judgment in the instant case. As the District Court found

> [w]hat is relevant is that the Jail staff was in the process of moving Decedent to the medical unit (according to the Department's procedures) when the most violent confrontation between Decedent and Defendant Helton occurred. This evidence, even in the face of the criticism leveled by Plaintiff's expert, distinguishes the case from *Russo*.

[Petitioner's Appendix D at 29a]. Given that the facts in *Russo* are distinguishable from the facts in the instant case, the Sixth Circuit did not violate its own precedent in affirming the summary judgment in the instant case.

(Cont'd)

> ever-mindful of its limited competence regarding executive functions, such as the formulation and administration of training programs.

Id.

13. The District Court found that the Knox County Sheriff's Department had a General Policy and Procedure Manual which had a General Medical Services subsection including procedures concerning the provision of mental health services to inmates. These procedures included screening; observing unusual responses to questions or behavior; housing a stable inmate with mental health problems in the special needs pod with referral to a mental health center for follow up services while incarcerated; housing a combative and uncooperative inmate in the therapeutic isolation room and calling Mobile Crisis to evaluate the inmate for emergency placement at a mental health facility with further follow-up. [Petitioner's Appendix D at 17a-18a].

B. The Sixth Circuit properly exercised its gate-keeping function in evaluating petitioner's expert evidence.

In performing its gate-keeping function when evaluating expert evidence, "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Electric Co. v. Joiner*, 522 U.S. 136, 146, (1997); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (expert evidence admitted should not only be relevant, but also reliable).

Petitioner's training expert conclusorily stated that Knox County's training materials "contain so little meaningful assistance to a new officer, that to teach from these documents exhibits deliberate indifference . . ." Petitioner's expert further stated in conclusory terms that Knox County's reliance upon the Policy and Procedures Manual "constitutes deliberate indifference to the rights and safety of mentally ill or emotionally disturbed persons. . . ." These statements iterated only a ready-made legal conclusion instead of reliable and relevant information to properly oppose a motion for summary judgment.

The "expert's" legal conclusion that Knox County acted with deliberate indifference is erroneous because he did not base that opinion on facts sufficient under the law governing municipality liability under 42 U.S.C. § 1983. The "expert" did not identify any prior incidents where mentally ill persons were mistreated by Knox County in the Detention Facility or Jail such that Knox County was on notice that its policies or training were inadequate nor did he identify any prior incidents of misconduct on the part of Defendant Helton such that Knox County was on notice that Officer Helton would

not follow policy or training or would, arguably, use excessive force. The "expert's" opinion contravenes *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S. Ct. 2427 (1985) (rejected a jury instruction that a single excessive use of force may warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference on the part of the government); *City of Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197 (1989) (plaintiff must prove that the identified deficiency in the training program was the actual cause of plaintiff's constitutional injury; federal courts are not to become involved in an endless exercise of second-guessing municipal employee-training programs); *Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397 (1997) (deliberate indifference is a stringent standard requiring proof that the governmental entity disregarded a known or obvious risk). It is well settled that deliberate indifference cannot be found on the basis of one incident. *Tuttle*, 471 U.S. at 820. Petitioner's expert cited no incident other than the one giving rise to the instant case and offered no evidence of a consistent or pervasive pattern of either unconstitutional use of force on mentally disturbed inmates or unconstitutional treatment of mentally disturbed inmates by Knox County such that it amounts to the County being deliberately indifferent to the rights of mentally disturbed citizens incarcerated in the Knox County Jail.[14]

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14. Petitioner's "expert's" opinion that the use of force was excessive is also erroneous under the law. The Eighth Amendment, not the Fourth Amendment, governs the use of force issue in this case because Mr. Carey was a pre-trial detainee at the time of the events. *Whitley v. Albers*, 475 U.S. 312, 327 (1986). Under the Eighth Amendment standard, if the use of force was applied in a good-faith effort to maintain or restore discipline, there is no civil rights violation; the use of force is not excessive unless it was applied maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992).

Therefore, the Sixth Circuit correctly upheld the summary judgment where the District Court found that petitioner's proffer of the conclusory statements of an expert whose credentials are suspect did not create a material fact issue as to whether Knox County was deliberately indifferent to the need for training on the handling of mentally ill inmates.

C. The Sixth Circuit's decision is not in conflict with the decisions of other United States Courts of Appeal.

Petitioner argues that other circuits have found that "under certain circumstances" a law enforcements agency's failure to adequately train its officers may constitute a "policy" giving rise to governmental liability. For this proposition, petitioner cites *Rivas v. Freeman*, 940 F.2d 1491 (11th Cir. 1991); *Avery v. County of Burke*, 666 F.2d 111 (4th Cir. 1981); *Jeffes v. Barnes*, 208 F.3d 49 (2d Cir. 2000); *Gibson v. County of Washoe, Nevada*, 290 F.3d 1175 (9th Cir. 2002).[15] Each of these cases is distinguishable from the instant case.

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15. Petitioner cites *Jones v. City of Chicago*, 787 F.2d 200, 204 (7th Cir. 1986) for the proposition that "in situations that call for procedures, rules or regulations, the failure to make policy itself may be actionable." The outcome in *Jones* does not support petitioner's position. *Jones* was a civil rights action against the city arising out of the sexual assault of two patients during gynecological examinations by the city health clinic physician. In *Jones*, the District Court entered summary judgment for the city and the Seventh Circuit affirmed. The Seventh Circuit held that absent specific evidence of prior incidents of sexual assault or of medical standards requiring: (1) the presence of a chaperone in the examination room; and (2) that the patient be informed of her right to have a chaperone

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In *Rivas*, a case of mistaken identity arrest, the evidence showed, unlike the instant case, that the Sheriff knew of prior instances of mistaken identity but allowed his deputies to detain individuals even where discrepancies existed.

In *Avery*, a troubling case which arose in North Carolina, the Fourth Circuit vacated a summary judgment in a case involving the sterilization of a minor who had been wrongfully diagnosed by the County Health Department with the sickle cell trait and urged by county nurses and social workers to be sterilized. The Fourth Circuit observed at the outset that the county is a proper and necessary party to resolve the minor's claim against the County Boards of Health and Social Services because neither the Board of Health nor the Board of Social Services was a legal entity separate and apart from the county, and if the minor was entitled to recover damages because of the boards' conduct, the county would be liable. The Fourth Circuit noted, however, that a single incident or isolated incidents are normally insufficient to establish § 1983 municipality liability.[16]

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present, city was not liable under 42 U.S.C. § 1983 to patient who first complained of sexual assault. The Court further held that the city's decision to clear physician of misconduct in connection with first-reported incident and failure to institute a formal policy requiring presence of a chaperone during gynecological examinations did not render city liable under civil rights statute to second patient.

16. Under North Carolina law both boards were required to promulgate guidelines and policies to protect the health and well-being of the citizens of the county. Furthermore, the state had recognized the prevalence of sickle cell syndrome as a matter of statewide and local concern and had specifically imposed on local
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Jeffes arose out of a campaign of harassment, threats and intimidation by members of the Sheriff's Department against plaintiffs correctional officers in retaliation for their public disclosures of flagrant abuse of inmates and their assistance in an FBI investigation. Plaintiffs correctional officers brought civil rights claims under the First Amendment. Affidavits and dozens of depositions revealed: (1) the infliction of severe physical abuse on seven inmates at the jail, witnessed by plaintiffs correctional officers who then went to the FBI and made public disclosures; (2) incessant depiction of plaintiffs as "rats" and "snitches" on posters and in graffiti in the jail; (3) name-calling of plaintiffs in public areas and over walkie-talkies; (4) harassing telephone calls to plaintiffs; and (5) outright threats of physical harm to plaintiffs correctional officers. Without expressing any view on the overall merit of the plaintiffs' claims, the Second Circuit vacated the summary judgment as to the county, remanded the case to the district court and concluded as a matter of law that the Sheriff was the county's final policymaker with respect to the conduct of his staff members toward one another, which could suffice for the imposition of liability on the county after a trial on the merits.

(Cont'd)
health departments the duty to provide testing and counseling for residents who may be afflicted. The evidence, read in the light most favorable to the minor, disclosed that the county had a substantial black population, that the sickle cell trait affects approximately 10% of the black population in the United States, that the board of health was involved in the sterilization of women, but that the board had no policies, rules or regulations for counseling and sterilizing persons believed to have the sick cell trait, such that these activities were by custom left solely to the standardless discretion of individual employees, and that in the case of this minor, the nurses who recommended sterilization had no special training in handling sickle cell cases and the social work assigned to counsel the minor about sterilization had only worked for the county for eight days.

In *Gibson*, which involved the death of a mentally ill inmate from a heart attack, the Ninth Circuit focused on the fact that the county had a written policy stating that "The Medical Screening process *will be delayed* if the inmate is combative, uncooperative or unable to effectively answer questions due to intoxication." *Gibson*, 290 F.3d at 1189. Because of this written policy, the Ninth Circuit reversed the summary judgment in part. In contrast, there is no evidence in the record that Knox County had a policy of delaying medical screening or assistance in such circumstances.

Because of the considerable factual differences between the foregoing cases and the instant case, it cannot be said that the Sixth Circuit's decision is in conflict with those of other Courts of Appeals on the same important matter.

III. Petitioner has not identified an important question of federal law that needs to be settled.

Read together, *Harris*, *Brown* and *Tuttle* have settled the important questions of federal law in connection with municipality liability under 42 U.S.C. § 1983 on the issues of inadequate training or policy. Likewise, *Anderson* and *Celotex* have long settled the summary judgment analysis. Thus, petitioner has not identified an important question of federal law that needs to be settled by granting certiorari in this case.

CONCLUSION

For the foregoing reasons, the Petitioner's Writ for Certiorari should be denied.

Respectfully submitted,

MARY ANN ROSS STACKHOUSE
Deputy Law Director
OFFICE OF THE KNOX COUNTY
LAW DIRECTOR
400 Main Avenue, Suite 612
Knoxville, TN 37902
(865) 215-2327

Counsel for Respondents Knox County, Tennessee; Timothy Hutchison, Sheriff of Knox County, Tennessee, in his official capacity; and Officer Jason Helton in his official capacity